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1946

THE
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OF THE INCORPORATED COUNCIL OF LAW REPORTING.

CHANCERY DIVISION
AND CASES IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

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ERRATA

[1945] Ch., at title pages. Between the names of The Right Hon. Sir Donald Somervell, K.C., M.P., and Sir Hartley Shawcross, K.C., M.P., Attorneys-General read " Sir David Maxwell Fyfe, K.C., M.P. (appointed May 29th, 1945)."

Between the names of Sir David Maxwell Fyfe, K.C., M.P., and Sir Frank Soskice, K.C., M.P., Solicitors-General read " Sir Walter Monckton, K.C., K.C.V.O. " (appointed May 29th, 1945)."

[1945] Ch. at p. 237, line 27. For " sub-cl. (*c*) of cl. 3 " read " para. (*c*) of " sub-cl. 13 of cl. 2."

[1946] Ch., at p. 270. Penultimate line should read " 100 First Debentures " of 1,000*l*. each carrying interest " and not as stated in Report.

[1946] Ch., at p. 315, first line. Before " evidence " insert " no."

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re ROBERTS, DECEASED.

PUBLIC TRUSTEE *v.* ROBERTS AND OTHERS.

EVERSHED J.

1945

July 13.

Insurance (Life)—Policy taken out by father on life of son—Declaration of trust in policy for son—Premiums paid by father during his life—Will of father directing policy moneys to be paid to son's children—Claim of executors to lien for premiums paid—Presumption of advancement.

In 1907 J. R. took out a policy of assurance for 500*l.* on his son's life, contracting to pay the annual premium. The insurers contracted that if the premiums were regularly paid, they would on the son's death pay 500*l.* to J. R. as trustee for the life assured. By his will, made in 1939, J. R. directed his trustees to pay the policy moneys equally between his son's wife and two daughters or such as should be living at his son's death.

J. R. paid the annual premium on the policy from 1907 to 1940, when he died. After his death his executors paid three further premiums, before the death of the son in 1942. The son's wife predeceased him, but his two daughters survived him. A claim was made by J. R.'s residuary legatees to a lien on the policy moneys for the thirty-three premiums paid by J. R. during his life, and the three paid after his death :—

Held, (1.) that the relation of father and son predominated over that of trustee and cestui que trust, and all the payments of premiums on the policy by J. R. during his life must be regarded as intended for the benefit of his son, (2.) that in considering whether or not an advancement is intended, the most important date is that of the first alleged advance or immediately before it, (3.) that the presumption of advancement did not apply to the

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premiums paid by J. R.'s executors to keep up the policy after his death, and that the residuary legatees were entitled to a lien on the policy moneys for those payments, (4.) that the directions in the will being void and ineffectual, the son's estate was entitled to the policy moneys, subject to the above lien.

In re Smith's Estate [1937] Ch. 636 per Luxmoore J., at p. 640, applied.

ADJOURNED SUMMONS.

By a contract dated September 12, 1907, and made between James Roberts the elder (hereinafter called "the testator") and the Life Association of Scotland, the testator assured the life of his son James Roberts the younger, for 500*l.* He paid one premium before the date of the policy and agreed to pay the annual premium of 11*l.* 3*s.* 4*d.* while the son lived. The insurers agreed that in the event of those premiums being regularly paid, they would on the death of the son pay 500*l.* and profits to the testator, his executors, administrators or assigns, "but always as trustee or trustees for the life assured." By his will, made in 1939, the testator, by cl. 5 thereof, gave the following directions to his trustees: "I give the policy of "insurance I have taken out with the Life Association of Scot-"land Office on the life of James Roberts my son by my first "marriage and all sums of money payable thereunder equally "between his wife Opie Roberts and his two daughters Marcia "Doreen Roberts and Margaret Thelma Roberts or such of "them as shall be living at my son's death and I direct my "trustees to keep the said policy on foot by paying the "premiums thereon out of the income of my residuary estate "hereinafter mentioned. This I consider the better course for "them to adopt but I leave it to their discretion to obtain the "surrender value of the policy instead of keeping the policy "on foot." The clause concluded with certain directions applicable only to the event (which did not happen) of the trustees accepting a surrender of the policy. So far as it was known both the original premium paid prior to the date of the policy and all other annual premiums which fell due during the life of the testator were paid by him. The testator died on May 5, 1940. The life assured, namely that of James Roberts the younger, was still subsisting and continued until September 25, 1942, when the son also died, leaving his two daughters mentioned in the above will surviving him. His wife Opie Roberts predeceased him. Between the date of the death of the father and the date of the death of the son the

EVERSHED J.

1945

ROBERTS, *In re.*
PUBLIC TRUSTEE *v.* ROBERTS.

policy was kept on foot by payments of the three premiums, which fell due on dates between the two deaths, out of the income of residue. This was done by arrangement between the parties concerned, proceedings having started during the lifetime of the son for the determination of questions arising as to the effect of the testator's will.

This summons was issued by the plaintiffs, as executors and trustees of the testator's will, to determine (1.) whether in the events which had happened the plaintiffs were entitled to a lien on the policy moneys to the extent of 368*l.* 10*s.* 0*d.* (being the total of thirty-three annual premiums of 11*l.* 3*s.* 4*d.* paid by the testator in his lifetime) together with interest thereon, (2.) whether on the true construction of the will and in the events which had happened the daughters of James Roberts' son, Marcia Doreen Roberts (now Edelman) and Margaret Thelma Roberts (now Ritchie), were entitled to the policy moneys, subject to the satisfaction of the said lien, in equal shares, or whether the policy moneys would form part of the testator's estate, (3.) whether the plaintiffs ought out of the policy moneys to recoup to the income or capital of the testator's estate the amount of the three annual premiums paid by the plaintiffs out of the income of the testator's estate, on September 1, in the years 1940, 1941 and 1942, (4.) how otherwise the plaintiffs ought to deal with or dispose of the policy moneys.

The summons named James Roberts the younger as the first defendant, and was amended after his death in September, 1942.

Hubert Rose for the plaintiffs.

Wilfrid Hunt for the defendant Marcia Edelman.

Winterbotham for the defendant Margaret Ritchie.

Burnett-Hall for testator's residuary legatees.

The arguments on the points which now remained for decision fully appear from the judgment of the learned judge. *In re Smith's Estate* (1) and *In re Leslie* (2) were referred to.

EVERSHED J., having stated the facts, continued: The argument on the one side is that the representatives of the testator are entitled to a lien on the policy moneys to the extent of premiums paid both during the testator's life, and also after his death, and that accordingly the policy moneys which have now been received must be applied, first of all,

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(1) [1937] Ch. 636.

(2) (1883) 23 Ch. D. 552, 560.

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in discharging that lien. It is further argued that the terms of cl. 5 of the will take effect on the sums so payable to the estate of the testator in discharge of the lien, with the result that, according to Mr. Hunt, those sums are now divisible between the two daughters of the son, James Roberts, their mother, Opie Roberts, not surviving at the date when the policy moneys became payable. Mr. Hunt has argued that a similar result applies as regards the amount representing the premiums paid since the testator's death, for he says that in keeping the policy alive the trustees were carrying out, in terms, the directions of the testator, so that it must be assumed that the residuary estate has contributed for the benefit of the two daughters of James Roberts junior, in accordance with the directions of the testator himself. Mr. Burnett-Hall, who represents the widow of the testator and the two children of his second marriage, being children of that widow, agrees in submitting with Mr. Hunt that the estate is entitled to the amount of the premiums paid by the testator in respect of the policy, but he says that cl. 5 cannot, on its fair construction, apply to the sum which has been so paid, with the result that that sum goes in accordance with the other parts of the will, in favour of his clients. On the other side, Mr. Winterbotham claims that cl. 5 is wholly ineffective for all present purposes; that it merely represents a misapprehension on the testator's part, and that the true view is that the whole of the policy moneys belong to the son's estate, the testator having declared himself trustee of those moneys in his son's favour and having according to the proper inference to be drawn from the facts as known, paid the premiums from time to time by way of advancement and in augmentation of the benefit intended for the son. He does, however, concede that in the circumstances, to which I will refer again presently, the premiums paid since the testator's death are in a different category, and he makes no claim on behalf of the son's estate to resist the charge of the father's estate to recover the three premiums paid since the testator's death.

That, I think, is a brief and I hope accurate outline of the contentions which are raised. The feature of the case which, so far as I am aware, is novel is whether, having regard to the terms of the policy and particularly of the declaration by the testator (who was a party to the contract), that he was always a trustee for his son of the policy moneys when they became payable, and having regard to such other evidence as is available and admissible, the testator must be treated as having advanced, within the technical sense of that term, the premiums which he paid during his lifetime. In none of the cases to which my attention has been drawn has that point been raised or determined. My conclusion is that the right answer to be given to the question is in favour of the son. True it is that the testator, having constituted himself in express terms a trustee for a beneficiary, would as such prima facie be entitled to an indemnity for moneys provided by him to preserve the trust property; but against that view must be set the fact that the trustee here was a father and the beneficiary was his own son. It is well-established that a father making payments on behalf of a son prima facie, and in the absence of contrary evidence, is to be taken to be making and intending an advance in favour of the son and for his benefit.

Mr. Burnett-Hall has contended that the relationship of trustee and cestui que trust overrides, so to speak, the conclusion which would normally flow from the relationship of father and son, but my own conclusion is to the contrary. In my view, where the trustee is a father and the beneficiary a son, payments made by the trustee for the benefit of the trust property are prima facie to be regarded as intended for the benefit of the beneficiary, namely, the son. I think that that view is supported not by the express terms but by the inference to be derived from the language of Luxmoore J., as he then was, in the case of *In re Smith's Estate* (1). So far as relevant that was a case where the point debated was in regard to premiums paid by a trustee to preserve a policy, the trustee being in that case the widower of a beneficiary who had died. The learned judge referred to the second head of the argument formulated by Fry L.J. in the case of *In re Leslie* (2), namely the right of a trustee prima facie to be indemnified out of the trust property for money expended on its preservation. He then proceeded: "In the present case Mr. Smith's payments appear to fall "within the second of those heads, unless there is some other "consideration which prevents that principle from applying to "the case. It is true that the relationship between the "trustee and the cestui que trust during their joint lives was "that of husband and wife; but after the wife's death that "relationship no longer existed." I infer that had the wife still been living the conclusion of the learned judge would have been that the relationship between husband and wife would have the effect, if the facts were confined to the mere circumstances of that relationship, of preventing the principle that trustees are entitled to indemnity from applying. The matter, as I have said, was not directly determined, but I regard that passage as lending support to the view which I myself take as to the right answer with regard to the conflict between the position, on the one hand of trustee and cestui que trust and on the other of father and son.

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(1) [1937] Ch. 636, 640.

(2) (1883) 23 Ch. D. 552, 560.

Now questions of advancement are questions of fact to be decided on the circumstances as known and as properly receivable in evidence, including in that phrase the proper inferences to be drawn from the facts so far as they are known. In those circumstances considerable reliance has not unnaturally been placed on the terms of cl. 5 of the will, because it cannot be denied that that clause proceeds on the view that the policy moneys and the policy, the benefit of the contract, were the testator's own property. It has been urged that the testator, having in 1939 so clearly asserted the view that he was entitled to the benefit of the policy, the inference proper to be drawn is that no advancement or gift was ever intended. In my judgment that is not the right conclusion. In the first place, in considering whether a father intends an advance to a son, the most important date to which to direct attention is the date when the alleged advance was made, or immediately before that time. Over the period of thirty-two years which passed between the date of the policy and the date of the father's will, the father paid premiums regularly on or about September 1 in each year, and the real question of fact is: When he paid each of these premiums what was his intention ? I feel that very little weight can really be attached to a declaration made by the testator thirty-two years after the making of the contract, assuming now that such a declaration is properly admissible on this matter of fact at all. It is to be noticed that when the contract was made in which the testator was stated to be a trustee for his son (a statement which must have been in the contract with his knowledge and consent), he had already paid one premium. I should find it extremely difficult to suppose that when the contract was executed he did not intend that the whole of the policy moneys, if they had become payable before any other premium became payable, should be paid or held by him or his estate on trust for his son but intended that they should be held for his son subject to a lien on his behalf for the first premium. If that conclusion is properly applied to the first premium, it is, I think, difficult to suppose that as each subsequent premium became payable and was paid some different result was intended or contemplated.

I, therefore, come to the conclusion that the right inference from the facts in this case—and they are admittedly slender—is that the father intended that the premiums that he paid for preserving the policy, in order to enable the sum of 500*l*. and profits to be paid over on the son's behalf, were intended by him by way of advancement. It is perhaps worth adding that if a father intends to provide for a son by means of a policy and does so by arranging in the contract of insurance that the policy moneys should be payable to the son, then there may be this strict difficulty in law, that the son, not being a party to the contract, might be unable himself to compel the insurers to pay. It may well be that the form was therefore adopted of the person entitled to receive payment being expressed to be the other party to the contract, namely, the father, he however stating that he would receive the moneys as trustee for his son. I mention that only because, as it seems to me, if the policy had been in the form that the policy moneys were expressed to be payable to the son, it would be extremely difficult, on the facts as known, to refute the view that as and when the premiums were paid they were intended as advancements to the son who was the person expressed to be entitled to receive the policy moneys. In substance, I very much doubt whether there is any real distinction between the two forms of arrangement, that is to say, between providing for policy moneys to be payable to the son, and providing for them to be payable to the father in trust for the son.

For the reasons that I have stated I, therefore, come to the conclusion that the policy moneys of 500*l*. plus profits were payable to the son. But there is this qualification, that the relationship of father and son ceased to exist when the father died. So far as three premiums were paid after the father's death, the presumption, as it is called, of advancement can no longer apply. Mr. Winterbotham, whether moved by the somewhat strong language of Sir George Jessel M.R. in another case, or for other good reasons, has not made any claim to those three premiums. I must therefore decide between Mr. Hunt and Mr. Burnett-Hall which of them is entitled to those three premiums amounting together to 33*l*. 10*s*. 0*d*. In my judgment Mr. Burnett-Hall, representing the testator's residu-

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ary legatees, is entitled to succeed as regards those sums. It does not seem to me that within the fair meaning and construction of cl. 5 the right of the executors to claim as chargees to receive 33*l.* 10*s.* 0*d.* out of the policy moneys is a subject-matter properly referred to and given by the terms of cl. 5. I think that that sum of 33*l.* odd falls back into the residuary estate. In fact I understand that it was paid out of the income of the estate. I have not heard arguments about this, but I should imagine that the proper course would be that it would go back to the income of the estate. I do not know whether there is any point upon that matter, but I decide that it is not effectively given by cl. 5 in favour of the two children represented by Mr. Hunt and Mr. Winterbotham.

Solicitors: *Coode, Kingdon, Cotton & Ward, for Chilcott & Sons, Truro.*

H. L. L.

UTHWATT J.

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July 13.

SAMUEL *v.* SALMON & GLUCKSTEIN, LIMITED.

Emergency legislation—War damage contribution—Landlord and tenant—Proportion which the rent reserved . . . . bears to the contributory value—Lease granted in consideration of annual premium and rent—Whether premium to be included in rent reserved—War Damage Act, 1943 (6 & 7 *Geo.* 6, *c.* 21), *s.* 50, *sub-ss.* 1, 2, 3.

Under the War Damage Act, 1943, s. 50, where land is let to a tenant, contribution is to be paid to the Commission in certain proportions, determined by (*a*), the period for which the tenancy has still to run, (*b*) the proportion which the rent reserved for the period bears to the contributory value of the property. In 1931 a lease of a London shop was granted for a term of twenty-two years, the lessees paying an annual premium of 600*l.*, and also a rent of 600*l.*, payable quarterly, for every year of the term:—

Held, that the annual "premium," being a payment for the use of the land, was part of the rent reserved by the lease, and that for the purpose of calculating the respective proportions of war damage contribution, the rent payable was in fact and in law not 600*l.*, but 1,200*l.*

ACTION.

By a lease dated June 9, 1931, the defendants demised to the plaintiffs a ground floor shop in Westminster for the term of twenty-two years. The material provisions of the lease were as follows. The lessors were defined as including "the persons "from time to time entitled to the reversion immediately "expectant on the term hereby granted," and the lessees as including their successors in title. By cl. 1: "In consideration of the payment by the lessees during the first twenty-one years of the term hereby granted of a premium at the rate of 600*l.* per annum payable yearly on December 25 in each of the years 1931 to 1951 inclusive and of the rent hereinafter reserved and covenants on the lessees' part and conditions hereinafter contained the lessors hereby demise unto the lessees." At the end of cl. 1 there was the following reservation: "yielding and paying therefor yearly and proportionately for any fraction of a year the clear yearly rent of 600*l.* to be paid without any deduction (except landlord's property tax and any tax on land values) by equal quarterly payments." The first covenant of the lease was: "The lessees hereby for themselves and their successors in title covenant with the lessors in manner following that is to say:— 1. That the lessees will pay to the lessors for and in respect of each of the first twenty-one years of the said term hereby granted the said annual premium of 600*l.* on December 25 in each and every of such first twenty-one years the first of such payments in respect of the year commencing June 24, 1931, to be made on December 25, 1931: Provided that in the event of the term hereby granted being determined whether by effluxion of time or forfeiture or otherwise howsoever during any of such first twenty-one years the premium payable hereunder shall cease to be payable as from the date of such determination but the lessees shall in respect of the period from June 24 next preceding the date of such determination up to the date of such determination pay a pro rata proportion of such premium immediately on such determination and the lessors will on such determination account to the lessees for any part of the premium paid in respect of any period beyond such date of determination." Clause 2 provided: "That the lessees will pay the rent hereinbefore reserved at the times and in manner aforesaid." By the fourteenth covenant it was provided: "The lessors for themselves and their successors in title hereby covenant with the lessees as follows: (*a*) That they the lessors will throughout the said term hereby granted pay and discharge all existing and future rates taxes assessments duties impositions and outgoings whatsoever charged or imposed upon the said premises or upon the owner or occupier in respect thereof or payable by either in respect "thereof (including the water rate)." The proviso for re-entry provided: "That if the said yearly rent hereby reserved" (as distinct from the annual premium) "or any part thereof "shall remain unpaid for twenty-one days after the "same shall have become due (whether formally or legally "demanded or not) or if default shall be made in the per"formance and observance of the covenants and stipulations on "the part of the lessees hereinbefore contained or if the lessees "shall go into liquidation (not being a voluntary liquidation "for the purposes of amalgamation or reconstruction) or if "any assignee or assignees of the lessees being an individual "or individuals shall become bankrupt or have a receiving order "made against him her or them or shall enter into any "composition with his her or their creditors or being a limited "company shall go into liquidation (save as aforesaid) then "and in any of the said cases or at any time thereafter it "shall be lawful for the lessors to re-enter upon the said "premises and thereupon this demise shall absolutely determine "but without prejudice to any right of action by the lessors in "respect of any antecedent breach by the lessees of the "covenants hereinbefore contained."

The plaintiffs claimed (so far as is material for the purpose of this report) a declaration that in determining the proportions of war damage contribution to be borne by the lessors and lessees respectively, under s. 50 of the War Damage Act, 1943 (1), the annual rent reserved by the lease was 600*l*. The defendants contended that on the true construction of the lease and the Act it was 1,200*l*.

T. J. Sophian for the plaintiffs. The premium, payable by annual instalments, is not rent reserved by the lease, but a payment quite distinct from rent. The proviso for re-entry

(1) War Damage Act, 1943, s. 50, sub-s: 1. "The proportion "appropriate, as at any date, to "a tenancy shall, for the purposes "of the two last preceding sections "be determined as follows."

Sub-s. 2: "There shall be ascer"tained the period which at that "date the tenancy has still to "run."

Sub-s. 3: "There shall also be "ascertained the proportion which "the rent reserved for the period "in which the relevant date falls, "or, if that period is other than "a year, the annual equivalent "thereof, bears—(*a*) where the land "comprised in the tenancy is the "contributory property in ques"tion, to the contributory value "thereof . . . ."

Sub-s. 4: "The proportion "appropriate to the tenancy is "the percentage in the table set "out at the end of this section."

comes into operation on the non-payment of rent, but not on the non-payment of the premium: see *Duke of Westminster* v. *Store Properties, Ld.* (1), where Bennett J. held that an additional payment of 50*l*. a year paid in consideration of a licence to use the premises for business was not rent reserved by the lease.

Harold Lightman for the defendants. The premium payable at 600*l*. a year, though described as a "premium" is in fact and in law rent, being an annual payment made in consideration of the use of the land. The real rent of the property, on which the calculation of war damage contribution must be based is not 600*l*. a year, but 1,200*l*. a year. It is rent reserved by the lease. See Gilbert on Rents (1758), p. 9; *Drake* v. *Munday* (2). The so-called premium lacks all the usual character of a premium. There is no collateral bargain for the right of entering into possession, or for goodwill, but it is a consideration for the demise. [He referred to *British Electric Traction Co., Ld.* v. *Inland Revenue Commissioners* (3); *Cox* v. *Harper* (4); *Hill* v. *Booth* (5) and *Smith* v. *Mapleback* (6).]

Cur. adv. vult.

UTHWATT J. in a written judgment stated the facts and the terms of the lease and continued: The effect of the leading provisions of the War Damage Act, 1943, in their application to this case, is that the contributory value of the premises in question is determined by the net Sch. A assessments (ultimately ruling during the year in question at the sum of 918*l*. 5*s*. 0*d*.), that the lessees under the lease in question were primarily liable to pay the instalments of contribution under the Act falling due in each of these years, and that under s. 48 the lessees had an indemnity in respect of each instalment from their landlords calculated by reference to the proportion of the tenancy as determined in accordance with s. 50 of the Act as at the relevant date, that is, January 1 in each year. One then comes to s. 50, which lays down the method of determining the proportion appropriate to any tenancy. The appended table goes upon the footing of determining the appropriate proportion by taking into account the two factors, unexpired length of the lease and proportion of rent to value as assessed in accordance with the calculation.

(1) [1944] Ch. 129.
(2) (1631) Cro. Car. 207.
(3) [1902] 1 K. B. 441.
(4) [1910] 1 Ch. 480.
(5) [1930] 1 K. B. 381.
(6) (1786) 1 Term Rep. 441.

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The only question argued was whether the expression "rent "reserved" in the section was for the purpose in hand 600*l.* or 1,200*l.*, and I was relieved from the necessity of considering the proviso or any other part of the section. It was assumed, perhaps rightly, that the expression "rent reserved" for the period in which the relevant date falls means the rent reserved for the yearly period of the lease in which the relevant date falls. "Rent service" has been defined as "an annual return made "by the tenant in labour, money or provisions in retribution "for the land that passes" (see Gilbert on Rents (1758), p. 9, Co. Litt. 142a). No technical words are needed in order to create a rent service, but in regard to that it is a return of something that was not in the grantor before the words "reddendo," "reservando," "solvendo" and "inveniendo" were treated as proper words (see Gilbert, p. 30). Of these words "reservando" seems to have captured the ear, with the result that it has become usual to refer to the rent agreed to be paid by a lease as the "rent reserved by a lease." But, in my view, "rent" and "rent reserved" do not differ in meaning.

Is this so-called premium "rent" or not? That, I think, is merely a question of the effect of the lease properly construed. There are no difficulties of interpretation, and the commercial effect of the lease is obvious enough. The "premium" is payable in each of the first twenty-one years, but is not payable in the twenty-second year. It is therefore payable periodically practically during the whole period of the lease. There is no prior quantification of a capital sum. The obligation to pay sums by way of premium ceases with the determination of the lease before its expiry by effluxion of time, and there is a provision for apportionment in respect of any broken year. There is nothing in the transaction which relates the premiums to anything except the right to occupy the leased land. The "premium," like the "rent," is expressed to be payable to the reversioner for the time being, showing the parties' intention that the "rent" and the "premium" were to march together. The differences between them under the lease—different days for payment and slight difference in the working of the forfeiture clause—are immaterial. It appears to me that the proper inference on the construction of the lease is that in all respects the sums were intended to be, as in fact they were, payments for the use of the land. In my view, the label "premium" applied to the promised payments does not alter

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the situation. Parties may freely make their agreement as to the terms on which the use of land is ceded by one to the other of them. Land may be leased for a consideration which is not a rent in law or for a consideration which consists of or includes a rent. The parties may write the agreement in such terms as they please and, if so minded, may attach any label they wish to the payments agreed to be made by the lease. But, when all that is done, it is for the law to decide on the effect of the document what payments are rent reserved and what not. No label can create a fact: a label may accurately describe a fact or it may mis-describe it, or may help to the solution of a doubtful question of interpretation. What the parties have done—not their description of it—is the determining consideration. In my view, the payments expressed to be premiums were in law part of the rent, and are for the purposes of s. 50 of The War Damage Act, 1943, part of the "rent reserved."

Solicitors: *Hicks, Arnold & Co.; Bartlett & Gluckstein.*

H. L. L.

In re NORTH SETTLED ESTATES; PUBLIC TRUSTEE *v.* GRAHAM.

EVERSHED J.

1945

May 16, 17.

Settlement — Portions — Hotchpot — Mode of valuation — Retrospective actuarial calculations of values.

Clause 51 of a deed of resettlement, dated June 24, 1924, contained the trusts of a term of nine hundred years created by cl. 6 thereof which were as follows "(1.) Upon trust . . . ." [after the death of three named persons to raise for the portion or portions of the younger children of a marriage and their issue] "such a sum as with the value of the share of each such younger "child in the trust fund subject to the trusts of" [a marriage settlement dated August 7, 1914] "if such trust funds were "presently divisible equally among all such younger children "would make up such share to 10,000*l.*, but not exceeding in the "whole in any event the sum of 20,000*l.*, such portion or portions "to be vested in and payable to such child or children or issue" in manner therein mentioned. The survivor of the three named persons above referred to died on December 10, 1938.

Part of the property subject to the marriage settlement consisted of the wife's reversionary interest under the marriage settlement of her parents and that reversionary interest was reversionary to the life interest of her mother, who died on October 27, 1941. A summons was taken out by the Public Trustee (the sole trustee of the resettlement) to determine whether, in making the calculation, which the settlement directed should be made, the marriage settlement funds, including the reversion, ought to be valued in the light of the facts as they existed on December 10, 1938, and without regard to the subsequent events; or whether the death of the wife's mother in 1941 having become known, the value of the reversion in 1938 should consequently be calculated with greater accuracy :—

Held, that this was a very special case in which no principle of valuing life interests, or anything of that kind in general, was involved; that the question how much the younger children were entitled to have by way of portions depended on the answer to the problem as presented on December 10, 1938; and that, in the special circumstances, it would be wrong to suppose that their rights were liable in any way to variation by reason of subsequent events.

Observations on the question of the valuation of life interests for purposes of hotchpot.

In re West [1921] 1 Ch. 533 discussed.

ADJOURNED SUMMONS.

The facts sufficiently appear in the head note.

Pennycuick for plaintiff.
Droop and *H. A. Rose* for defendants.

EVERSHED J. [after dealing with other questions raised by the summons continued :] I think that what is required to be done is to see what was the value on December 10, 1938, of all the property subject to the marriage settlement on the footing that under that settlement no life or other terminable interest remained subsisting, but that the children of the marriage were equally entitled to the property among them. Therefore I conclude that the assumption that the wife's mother had died ought not to be made. There remains the most difficult of the questions involved in this problem. The wife's mother survived December 10, 1938, but only for a short period. The question, therefore, is, whether, in making the calculation which the settlement directs, you value the marriage settlement funds, including this reversion, in the light of the facts as they existed on December 10, 1938, and without regard to the subsequent events, or whether you say that, the death of the wife's mother in 1941 having become known, you should calculate as you can with far greater accuracy what was in fact the value of the reversion in 1938.

[After further construing the clause his Lordship continued :] What I am trying to express is that you are dealing here with a purely arithmetical problem based on hypotheses; prima facie the true facts do not come into the picture at all, except to the extent to which you are directed to take them into account, namely, as regards the actual balance of the funds referred to. I have found it by no means easy to arrive at a conclusion, but the conclusion which I have intimated above is, of course, one at which I arrive treating this case, as it is, as a wholly special case. It would be wrong, I think, to suggest that any principle of valuing life interests or anything of that kind in general is here involved. The question turns on the construction of a clause which, as Mr. Rose points out, is sensible enough in intention but is extremely strange in some of its expressions. It is a special case in the sense that you are asked to construe a provision for doing an arithmetical sum for a particular purpose on a certain hypothesis selected for reasons of their own by the settlors.

Having said that, it follows that all matters of authority are, as I think, excluded, but, in deference to the arguments, I feel it right that I should say something on the authorities to which reference has been made, and I ought at least to do so in case it should be said that they provide some principle which governs this case (albeit it is one of the construction of a document) and which, therefore, I am bound to follow. Mr. Droop, in his argument, to some extent founded himself on the view that there was here at least an analogy with hotchpot cases. Mr. Rose has in answer given at any rate cogent reasons for saying that the analogy is not very close. I do not think it necessary to express a view one way or the other on the question whether it is in some degree analogous to a hotchpot case, but, assuming that there is some comparison to be drawn between a provision of this kind and a hotchpot case, then the decision of Astbury J. in *In re West* (1), has a bearing on the matter. In that case Astbury J. dealt with the authorities bearing on the question of valuations of life interests for hotchpot purposes. In particular he referred to an Irish case—*In re Westropp* (2), which appears to be the only case having a direct bearing on the problem how a life interest ought to be valued for hotchpot purposes, which is still subsisting at the date when that interest has to be brought into hotchpot and the valuation made. According to the citation Ross J. stated that the proper way to ascertain the value of the life interest was by obtaining an actuarial calculation of the value of that life interest on the date of the death of the

(1) [1921] 1 Ch. 533.

(2) (1903) 37 Ir. L. T. 183.

appointor, which was the date on which the valuation had to be made for the purpose of hotchpot. The quotation from *In re Westropp* (1) is followed immediately by this passage in Astbury J.'s judgment : " In that case there was no contingency or " uncertainty, and it may well be that the actuary in pursuance " of this direction would have valued the expired life interest " as an annuity for about twenty-two years certain." The point of that observation is that in *In re Westropp* (1) it happened that although the life interest had to be valued for hotchpot purposes in the year 1866 the life in question had determined twenty-two years afterwards, as was known in fact when the case came before the Irish Court. It may, therefore, be said that Astbury J. was implying in that sentence that even in such a case it would be proper to prefer fact to prophecy and to arrive at the value for hotchpot purposes of the life interest by reference to the facts as they had become known rather than by putting on, so to speak, 1866 spectacles and then making an estimation of what the value of that life interest would then have been. If that is so, support is given for the validity of the general terms of the phrase in the headnote : " In retrospective actuarial calculations of values at a " past epoch, the subsequent facts, rather than the original " probabilities, should as far as possible be taken as the data."

I think it unnecessary for me to express in this case any conclusion on a matter which is not before the court, but my own inclination is to think that the passage in the headnote which I have read goes further than is justified by authority, if that passage is intended to have the wide general application which, on the face of it, it bears. I am inclined to think that the authorities go no further than this : that it is proper and legitimate, when the date on which the valuation has to be made is later than events which have in fact happened, material to the value to take those events into account, but prima facie it is not legitimate to take into account matters of fact occurring after the date which is the material date for valuing the life interest for hotchpot purposes. Assuming, therefore, an analogy between this case and a hotchpot case, I think that Mr. Droop derived some support from *In re West* (2), and particularly from the approval to that case given in Jarman on Wills. [See Jarman on Wills, 7th ed., p. 1147.] Further, I accept Mr. Droop's argument that *Wheeler* v. *Humphreys* (1) in the House of Lords does not seem, one way or the other, to affect the general principle applicable to a valuation of a life interest for hotchpot purposes. *Wheeler* v. *Humphreys* (1) was obviously a special case and it does not seem to me that the question of actuarial valuation entered into it at all.

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(1) 37 Ir. L. T. 183.

(2) [1921] 1 Ch. 533, 541.

I have also been referred to two recent cases, of which the first in order of date is that of *Williamson* v. *John I. Thornycroft & Co., Ld.* (2) in which a claim for damages had been made by a widow and her son under Lord Campbell's Act and the Law Reform (Miscellaneous Provisions) Act, 1934, arising out of the death of the lady's husband. It is beyond question that the right of action had accrued on a particular date and that on that date the damages had to be assessed, but it so happened that before the matter came on before the learned judge of first instance the widow had died, and the question was whether he had to assume, in assessing the damages, that an estimation should be made of the expectation of the widow's life on that date without regard to her subsequent death, or whether the fact that she had survived her husband by only a relatively few months should be taken into account. The answer was that you should take into account and arrive at the assessment of damages on the basis of the true facts as they happen to be known when the case comes before the court. I think that the principle is clearly this, that the court is there compensating a person for loss. The question what compensation ought to be given depends on discovering what in fact was the loss. If at the time when the court tries to answer that question anything has happened which makes the calculation of the loss certain, or more certain, then the court should take those facts into account. If there is nothing available to make that calculation certain, then it must be done in the only other way possible, namely, by an estimation.

The second case, in which the one that I have just mentioned was also referred to, was *In re Bradberry* (3). There the question was, putting it briefly, the extent to which the court could pay regard to actual facts in valuing an annuity in the course of the administration of an estate which had turned out to be insufficient to provide all the annuities and allowances in full. The learned judge, following, I think fundamentally the same

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(1) [1898] A. C. 506.

(2) [1940] 2 K. B. 658.

(3) [1943] Ch. 35.

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principle as that which had been applied in *Williamson* v. *John I. Thornycroft & Co., Ld.* (1), said that there was no reason to neglect fact for prophecy, and that if the facts were available then the court, in doing the best it could, should pay regard to the actual facts and not neglect them by making an estimation of the value of the annuity as at some date when the annuitant was still living, and shutting one's eyes to the annuitant's subsequent death. It is, I think, important to bear in mind that in such a case as *In re Bradberry* (2), the need for making any valuation at all and the right on the annuitant's part to have a valuation made was not something which at any rate necessarily existed at any prior time. On the death, for example, of the testator it might or might not be that the estate would turn out to be insufficient. The purpose of the valuation was not for giving effect to the testamentary dispositions, but for doing, to the best of the court's ability, justice between the beneficiaries at a time when it had been discovered that the testator's benefactions were no longer capable of being carried exactly into effect.

Therefore, there is, in such a case, no question on all-fours with the important point here involved, namely: that one is, so to speak, tied to a particular past date as being the date on which the valuation must be made. You are carrying out in annuity cases the duty of doing the fairest thing that can be done at the date when the order comes to be made. Thus Uthwatt J. says (3): " If one bears in mind that the question is one " of administration only, and that the duty of the court is to do " the best it can, there can, in my view, be but one answer to " the question and that is that the court should take into " account every relevant fact that is known at the date when " the decision is to be made and work out the rights of the " parties accordingly." It does not seem to me that the principles which underlie those cases really cover the very special problem of construction which arises in this case. The selection of hypotheses in documents of this sort is not uncommon. It is certainly very common to find that in certain events funds should be distributed to the next-of-kin of a person as if that person had never been married or had died unmarried and without issue, a purely hypothetical state of affairs. As I have said, I think that here a problem is set based on pure hypothesis, and that the consequent duty of the

(1) [1940] 2 K. B. 658.

(2) [1943] Ch. 35.

(3) Ibid. 42.

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trustee is to work out this arithmetical problem on the hypothesis presented, and to treat it as an arithmetical problem based on that hypothesis from first to last. I will only add, in conclusion, that the question how much these younger children are entitled to receive by way of portions, and in particular to what sums of interest they may be entitled, depends on the answer to that problem as presented on December 10, 1938. I think it would be, in the special circumstances of this case, wrong to suppose that the rights of the parties, of the kind that I have suggested, were liable in any way to variation by reason of subsequent events.

Solicitors: *Burchells; Taylor & Humbert.*

J. L. D.

In re DIXON, Deceased: LLOYD'S BANK, LIMITED *v.* De KOJINE.

VAISEY J.
1945
June 1, 5.

Will—Annuity of 78l. free of tax bequeathed before September 3, 1939—*Codicil made in June,* 1940—*Substitution of annuity of increased amount—" Provision for payment of stated amount free of income " tax "—When provision made—Finance Act,* 1941 (5 & 6 *Geo.* 6, *c.* 30), *s.* 25.

A testatrix by her will made in February, 1939, directed the payment of an annuity of 78*l.* free of income tax, all rebates and allowances to enure for the annuitant's benefit. In June, 1940, she made a codicil reciting the gift of the annuity and directing that the will should be read and construed as if the sum of 104*l.* had been inserted in the relevant clause in place of 78*l.*, and in other respects she thereby confirmed her will:—

Held, that the annuity of 104*l.* was entirely provided by the codicil, which must be read as a new provision revoking the original provision made by the will, and therefore the case did dot come within s. 25 of the Finance Act, 1941, and the annuitant was entitled to the 104*l.* a year free of all income tax.

In re Sebag-Montefiore [1944] Ch. 331 distinguished: Observations of Lord Greene M.R. therein at p. 336 applied.

Adjourned Summons.

The testatrix, Grace Gertrude Dixon, by her will, dated February 24, 1939, directed the trustees out of the income of her residuary estate to pay the annual sum of 78*l.* to her sister, the defendant, Madame de Kojine, during her life, free of income tax, by weekly payments of 30*s.* with a further direction that all rebates, allowances or repayments which might be made to or recovered by the said defendant in respect of income tax should enure for her benefit, and that she should not account to the trustees for the same or any part thereof. On June 27, 1940, the testatrix made a codicil to her will. After reciting that she had by her will directed her trustees to pay the annual sum of 78*l.* to the said defendant during her life, free of income tax, by weekly payments of 30*s.*, she thereby directed that her said will should be construed and have effect as if the sum of 104*l.* had been inserted in the relevant clause in place of the sum of 78*l.*, and as if a weekly payment of 2*l.* had been inserted in such clause in place of the 30*s.* therein mentioned. In all other respects she confirmed her will.

The testatrix died on April 4, 1944, and this summons was taken out by Lloyds Bank, Ld., the trustees, to determine the question whether for the purposes of s. 25 of the Finance Act, 1941 (1), the provision of the annuity to Madame de Kojine was made (*a*) by the will, or (*b*) by the codicil, or (*c*) as to 78*l.* thereof by the will, and as to the balance of 26*l.*, making together, 104*l.*, by the codicil.

Hillaby for the plaintiffs.

Myles for the defendant, Madame de Kojine. The provision of the annuity was made by the codicil and not by the will. It was an entirely fresh provision, the effect of which was to revoke the original annuity of 78*l.*, and to substitute therefor an annuity of 104*l.*, in both cases free of tax. The result is that the annuitant is entitled to an annuity free of tax. The case comes within *In re Sebag-Montefiore* (2) —not the actual decision in that case, but the hypothetical case put by Lord Greene M.R. in his judgment, beginning with the words " Of course there " may be cases where the provision is for the purposes of the " section, made by the codicil . . . . (3).

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(1) Finance Act, 1941, s. 25, sub-s. 1, subject to the provisions of this section, " any provision " . . . . for the payment . . . . " of a stated amount free of " income tax . . . . being a pro- " vision which—(*a*) is contained " in . . . . any will or codicil " . . . . and—(*b*) was made before " the third day of September, 1939 " and—(*c*) has not been varied " on or after that date, shall, as " respects payments falling to be " made during any year of " assessment, the standard rate of " income tax for which is ten " shillings in the pound, have " effect as if for the stated amount " there were substituted an " amount equal to twenty twenty- " ninths thereof."

(2) [1944] Ch. 331.

(3) Ibid. 336.

Burnett-Hall for the residuary legatee. The case is governed by *In re Sebag-Montefiore* (1) and in its facts is indistinguishable from the facts of that case. The provision is made as to 78*l.* a year thereof by the will, and as to the extra 26*l.* by the codicil. There is no revocation by the codicil of any gift in the will. All that the testatrix did was to increase the annuity from 78*l.* to 104*l.* The fact that she concluded by otherwise confirming her will shows that she had no intention of revoking the gift made in it. The effect is that s. 25 of the Finance Act, 1941, applies to 78*l.* of the annuity, but not to the extra 26*l.*, which is given entirely free of tax.

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Cur. adv. vult.

VAISEY J. read a judgment in which he stated the facts and after reading s. 25 of the Finance Act, 1941, continued :— The question which I have to decide is this : By which of the two instruments, the will or the codicil, was the provision for the payment of the stated amount of 104*l.* per annum free of income tax made ? If, and so far as, it was made by the will, it was made before September 3, 1939, and is subjected to the substitutionary operation prescribed by the Act of 1941. If, and so far as, it was made by the codicil, it was made after September 3, 1939, and is not within the terms of the Act. I am clearly precluded by authority from saying that the provision was made at, and not before, the death of the testatrix (*In re Waring* (2)), and also from saying either (*a*) that the codicil effects any such "variation" as the section contemplates of the will or of the provision contained in the will, or (*b*) that the confirmation of the will by the codicil has any bearing on the matter (*In re Sebag-Montefiore* (1)). I am left to choose between two alternative views : (i.) that the payment of the 104*l.* was provided wholly by the codicil, and (ii.) that it was provided as to 78*l.* part thereof, by the will, and as to 26*l.*, balance thereof, by the codicil. A third view, that the payment was provided wholly by the will, was admitted by counsel to be untenable ; and so I think it is.

Unguided by authority I might have thought that the Act was intended to deal only with those cases in which the quantum of the "stated amount" had been fixed before the outbreak of war, to the exclusion of those cases in which it was fixed afterwards. This, broadly speaking, is no doubt the effect of it. If the testatrix in the present case had signed her will fixing the

(1) [1944] Ch. 331. (2) [1942] Ch. 426.

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quantum of the annuity on September 3, 1939, or on any subsequent day, it would have been unaffected by the Act. Logically, I should have thought, the Act would not have applied where, as here, the quantum has been fixed by a codicil signed not before, but after, the outbreak of the war; that is to say, when the exceptional circumstances brought about by the war were no longer future and unpredictable, but were present, actual and known. I cannot, however, so regard the matter, for in *In re Sebag-Montefiore* (1) it was decided by the Court of Appeal that where an annuity bequeathed by a will free of income tax is increased in amount by a codicil, it is only to the extent of the increased amount that the bequest being made by the codicil is not within the Act. At first sight, this might appear to cover the present case, but it is plain from the judgment of Lord Greene M.R. that very fine lines of distinction have to be drawn, and it is necessary to examine that case somewhat closely. There, the will, dated in 1937, had bequeathed a certain life annuity of 300*l.* free of income tax, and a codicil dated September 25, 1939, directed that it should be " increased to 400*l.*" Lord Greene first deals with the question whether a mere variation in the amount of the tax-free sum is a variation within the meaning of the section, and after holding that it is not, he expresses the view that the disposition as to the original 300*l.* had not in fact been varied, and then proceeds (2): " All that the testatrix has done is to " add something to the annuity she had already given by the " will. The gift of that annuity by the will is in no sense " revoked. It still stands and the provision for it is I think " 'contained' in the will within the meaning of the sub-" section. It is only the provision for the additional 100*l.* " which is contained in the codicil." I hope that I am correctly interpreting the words which I have just quoted as meaning that the direction to " increase " 300*l.* to 400*l.* has to be regarded as leaving the 300*l.* where it was and adding to it a further 100*l.*, or to put the matter in another way, as augmenting it or increasing its bulk without destroying its identity, and that I am further justified in supposing that if the codicil in *In re Sebag-Montefiore* (2), had expressly revoked the bequest of the annuity of 300*l.*, and had then bequeathed a new annuity of 400*l.*, the decision in that case would, or at any rate might, have been the other way. In that supposition I am fortified by the passage in the judgment of Lord Greene where he says (1) " Of course, there may be cases where the " provision is, for the purposes of the section, ' made ' by the " codicil and not by the will. For example, if a testator, " having bequeathed tax free annuities by a clause in his will, " revokes that clause by a codicil and substitutes a list of " annuitants containing the name of one of the original " annuitants as legatee for an annuity similar in all respects to " that originally given, the provision of that annuity would " obviously, for the purposes of the sub-section, be made in the " codicil and not in the will. Another example would be " where a testator by his will gave to a legatee a tax free annuity " of such an amount as he might by codicil prescribe and " subsequently by a codicil prescribed the amount."

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(1) [1944] Ch. 331.

(2) Ibid. 338.

Looking now at the terms of the codicil in the present case, I ask myself whether they are more nearly equivalent (*a*) to leaving the 78*l.* given by the will and either adding to it a further 26*l.* or increasing it by that amount, in which case I must follow the decision in *In re Sebag-Montefiore* (2), or (*b*) to a revocation of the 78*l.* annuity and the substitution for it of a new annuity of 104*l.*, in which case I am free to act in the light which appears to me to illumine the position from the observations of Lord Greene which I have quoted. I do not find the choice an easy one to make. It is regrettable when distinctions have to be drawn between cases which are in substance, and for most purposes, identical. Here, there is apparently nothing but a formal difference between the bequest of an annuity of 78*l.* by the will plus the bequest of an additional annuity of 26*l.* by the codicil, and the bequest of one single annuity of 104*l.* by the codicil, but I see no escape from the conclusion that the difference is, for the purposes of the Act, important. I have come to the conclusion that I must read the codicil here, having regard to the particular manner in which it is expressed, as in effect wiping out the 78*l.* annuity altogether and putting into its place one new single annuity of 104*l.*, and not as leaving the annuity of 78*l.* standing and either " increasing " it by a further 26*l.* or giving a second annuity of 26*l.* as an addition to it. I will therefore declare that the annuity of 104*l.* is effectively bequeathed free of income tax, and that the provisions of s. 25, sub-s. 1, of the Finance Act, 1941, do not apply to it or to any part of it. As regards the costs, it is rather hard on the persons interested in the residuary estate

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(1) [1944] Ch. 336.

(2) Ibid. 331.

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to have to pay for the solution of a problem for the existence of which neither the testatrix nor her legal advisers can be held to be in any way responsible, but I feel bound to order that the costs of all parties of the application, taxed as between solicitor and client, be raised and paid out of the estate in due course of administration.

Solicitors: *Peacock & Goddard, for Buchanan & Llewellyn, Bournemouth.*

H. L. L.

EVERSHED J.

1945

July 2, 3, 4.

FOSTER WHEELER, LIMITED *v.* E. GREEN & SON, LIMITED.

Patent—Agreement that B. shall not sell article to any person or corporation other than A.—Supply of article for service of the Crown—Authorization by government department—Effect on agreement—Patents and Designs Acts, 1907 *to* 1942, *s.* 29, *sub-s.* 1.

On January 24, 1939, A. entered into a contract with B., that B. should not sell fuel economizers for use in connexion with marine boilers to any person or corporation other than A., and certain other persons therein specified. By a letter, dated January 22, 1945, and headed "Economizers for Weapons class "destroyers" (referring to a request for the supply to the Admiralty of two economizers for "Weapons" class destroyers) the Director of Navy Contracts informed B. that the Admiralty were, under s. 29 of the Patents and Designs Acts, 1907 to 1942, empowered to authorize B. to supply economizers for the service of the Crown:—

Held, that the covenant in the contract was inoperative as regards the orders given by the Admiralty for the supply of the economizers referred to in the letter of the Director of Naval Contracts.

MOTION.

On January 24, 1939, Foster Wheeler, Ld. entered into a contract with E. Green & Son, Ld., which provided by cl. 2:— "Greens during the continuance of this agreement will sell "and supply economizers to Foster Wheeler for sale in "accordance with the terms of this agreement and will not "knowingly sell nor grant manufacturing rights for any "economizer for use in connexion with marine boilers to any "person or corporation in Great Britain other than Foster "Wheeler except as provided by cl. 8 hereof. Foster Wheeler "shall have no right to transfer the benefit of this provision."

Clause 8 :—" Notwithstanding cl. 2 hereof Greens shall have " the right to quote for or sell economizers for use in connexion " with marine boilers to boilermakers who are now existing " customers of Greens . . . ."

By a letter, dated January 22, 1945, and headed " Economizers for weapons class destroyers " (relating to a request made by the Admiralty to E. Green & Son, Ld. for the supply to them of two economizers for weapons class destroyers) the Director of Navy Contracts informed E. Green & Son, Ld. that the Admiralty were, under s. 29 of the Patents and Designs Acts, 1907 to 1942 (1), " empowered to authorize " you to use any invention for the services of the Crown " notwithstanding any agreement which may be in force in " relation to the invention. You are accordingly hereby " authorized by the Admiralty to make, use, exercise or vend " for the purpose of manufacturing and supplying economizers " for the service of the Crown the inventions, or any of the " inventions, the subject of an agreement, dated " January 24, 1939, and made between Foster Wheeler, Ld. " and yourselves, or of the agreement of June 1, 1928, referred " to in the former."

Foster Wheeler, Ld., having been informed by E. Green & Son, Ld., of the directions contained in the letter from the Director of Navy Contracts, commenced an action for an injunction restraining E. Green & Son from selling or granting manufacturing rights for any economizer for use in connexion with marine boilers to any person or corporation in Great Britain other than Foster Wheeler, Ld., or boilermakers who were customers of E. Green & Son, Ld., on January 24, 1939, in breach of the provisions contained in cl. 2 of the contract of January 24, 1939.

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(1) By Patents and Designs Acts, 1907 to 1942, s. 29, sub-s. 1 : " A patent shall have to all intents the like effect as against " His Majesty the King as it has " against a subject : Provided " that any Government department may, by themselves or by " such of their agents, contractors, " or others as may be authorized " in writing by them at any time " after the application, make, use " or exercise the invention for the " services of the Crown on such " terms as may, either before or " after the use thereof, be agreed " on, with the approval of the " Treasury, between the department and the patentee, or, in " default of agreement, as may be " settled in the manner hereinafter " provided. And the terms of " any agreement or licence concluded between the inventor or " patentee and any person other " than a Government department, " shall be inoperative so far as " concerns the making, use or " exercise of the invention for the " service of the Crown . . . ."

The action came before the court on a motion, which was treated as the trial of the action.

Valentine Holmes and *C. Montgomery White* for Foster Wheeler, Ld. There is no dispute as to the facts. The Admiralty are, however, acting under a misapprehension. The covenant can only be broken by E. Green & Son, Ld., if there is some statement in the agreement which justifies that conduct. There is nothing in the Patents and Designs Acts, 1907 to 1942, which authorizes the Admiralty to say, in effect, to E. Green & Son, Ld.: "Although you have "covenanted with Foster Wheeler, Ld., not to sell to others, "we order you, nevertheless, to do so." No government department can confer authority on persons to avoid agreements between third parties.

G. H. Lloyd-Jacob for E. Green & Son, Ld. Section 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1942, gives the Crown the right to authorize the use of a patented invention, irrespective of any agreement. Accordingly the terms of the agreement between the parties are to that extent inoperative. If, however, the Crown is enabled, by virtue of that section, to secure the use of inventions and to bring about the disregard of contractual obligations, there may be a question of compensation. [He referred to *No-Nail Cases Proprietary, Ld.* v. *No-Nail Boxes, Ld.* (1).]

EVERSHED J. after stating the facts, continued: I must point out that neither the agreement of January 24, 1939, nor that of June 1, 1928, in terms purported to deal with the patented invention, and it was really not an accurate form of speech to refer to inventions—and in this case there is but one—as being the subject of this agreement, dated January 24, 1939. I say that because I am not entirely satisfied that the Board of Admiralty, through the Director of Navy Contracts, had fully appreciated the significance of the two agreements to which he referred. That is not intended as a criticism of the Director in his absence, but I raise it as a question in case the Board of Admiralty may think it desirable to reconsider the form in which this authority has been given, if they desire to repeat it. It is the fact that the fuel economizers

(1) [1944] K. B. 629.

comprised in this order for "Weapons" class destroyers were apparatus, in part consisting of the one patented process, which had, pursuant to the original agreement of 1928, been transferred to and become vested in the defendants: but it is necessary to observe, as I have already indicated, that neither of the two agreements was on the face of it dealing with inventions or patents as such, but was by way of making commercial arrangements in regard to apparatus no part of which might be comprised in letters patent. I have considered whether the form of the letter of the Director of Navy Contracts is such as to make it inapplicable in any event to these economizers, through having used what I ventured to describe as a not entirely accurate expression in relation to these inventions, but I think that that would be taking too critical a view of the language of this document. It was plain from the previous correspondence that the contracts themselves had been shown to the Board of Admiralty, and nobody was in any doubt what in fact the Director of Navy Contracts meant. I therefore place no reliance on the reference to the agreements in the letter of January 22, 1945.

The point, therefore, that emerges really turns on the effect of s. 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1942. There is a preliminary point to which I drew attention in the course of the arguments, and on which, I confess, I am not entirely happy in my mind. The covenant by Greens was not to sell to any "person or corporation" other than the plaintiffs. The question arises whether, within the meaning of this contract, the Lords Commissioners for Executing the Office of Lord High Admiral are the buyers of the economizers and, if so, whether they are either a person or persons, or on the other hand a corporation. That they may be such for some purposes is not obviously conclusive in a matter which depends on the construction of this document, but I am prepared to assume, in the plaintiffs' favour, for the purposes of this judgment, that the Board of Admiralty are the buyers and are comprehended under one or other of the heads of that expression.

I therefore turn, on that assumption, to the section of the Act, and it opens with the following words: "A patent shall have "to all intents the like effect as against His Majesty the King "as it has against a subject." The main purpose of the section, as expressed in those two lines, is to provide that a patentee who has been granted monopolistic rights in regard to an invention shall be in a position to exercise those rights against the Crown, and can, therefore, if he desires, exclude the Crown, save on his own terms, from making any use of the invention. It is therefore true to say that the proviso which follows must be construed as a proviso to the main operative part of the section. There is very strong authority that one is not entitled, by reading too generously the words of the proviso, to read into the main operative part of the section words that are not there at all. On the other hand, as has been pointed out in *No-Nail Cases Proprietary, Ld.* v. *No-Nail Boxes, Ld.* (1), to which I shall later refer further, the first duty of the court is to construe the terms of the statute according to their proper, plain and sensible meaning. The material words, so far as I can see, in the sub-section are these : " Provided that any government department may, by themselves or by such of their " agents, contractors, or others as may be authorized in writing " by them, make, use or exercise the invention for the services " of the Crown on such terms as may . . . . be agreed on " . . . . between the department and the patentee." As I have said, and as the first two lines of the section indicate, in the absence of some limitation the Crown could not make any use of a patented invention, save on such terms as the patentee himself laid down. It is therefore urged, and if I may say so urged forcibly, by the plaintiffs that the whole of this proviso must be treated as limited by this consideration, namely, that it is designed to free the Crown on the terms stated from the effect which would otherwise arise if it attempted without the leave of the patentee to make use of a patented article, that is to say, if it broke or infringed the monopoly rights of the patentee. I think, as I have said, there is great force in that argument, but I have (I confess after considerable hesitation) come to the conclusion that it would not be right, particularly having regard to the decision of the Court of Appea in the case already mentioned, to limit this proviso or the terms of it to such an extent as would disable the Crown or any department from exercising the rights given to them under this section, save in cases where what they seek to do would otherwise be an infringement of the patent. I think it is perfectly legitimate, and in accord with the opening two lines of the sub-section, to say that the purpose of the proviso is to enable departments of state to make use of patented inventions on such terms as may be fair between the Crown and the patentee, even though what they

(1) [1944] K. B. 629.

are seeking to do or to procure to be done will not be an infringement of the patent rights as such.

In the present case the defendants, according to the terms of their contract, would be unable to make, use or exercise the invention themselves for the service of the Crown, because (on the footing that " person or corporation " includes the Admiralty) they would be bound to say to the Director of Navy Contracts : " We cannot sell to you. We must sell to Foster " Wheeler and you must make your terms with them." I have come to the conclusion that I should not be justified, on the ordinary commonsense meaning of this phrase, in denying to those seeking to exercise this privilege the right to say " We " authorize you to make, use and exercise this invention for " our service on terms agreed between us and without regard to " any other rights anybody may have, whether those rights " are strictly rights appertaining to the patent or not." I think in a sense that that really follows in principle from the decision of the Court of Appeal in the *No-Nail* case (1). I follow that there is this distinction between the two cases, that the licensees to whom the authority was given in the *No-Nail* case (1), though entitled to manufacture, could only do so on the terms of the licence, and had they failed to carry out those terms they would prima facie have infringed the patent. That, I agree with Mr. Montgomery White, is a distinction. But, as I read the somewhat wide terms of du Parcq L.J.'s judgment, I think its principle extends further, so that I should not be justified in saying that this proviso has no application where the authority is addressed not to the licensee but to the patentee himself. It follows, if I am right, that the last four lines of the sub-section must have the effect that the covenant of E. Green & Son, Ld., as regards the orders given by the Admiralty, is inoperative, and that the plaintiffs would be unable to found a cause of action for breach of contract on a failure by E. Green & Son, Ld. to pass over, as it were, to them orders which they obtained from the Director of Navy Contracts, by virtue of the authority under s. 29, sub-s. 1.

There are just one or two other points which I ought to mention. I have already stated that the part of this apparatus which is patented is, so far as I know, simply a part—I have no information as regards its importance—and that has led me to wonder whether the authority can extend to doing anything more than supplying to the Board of Admiralty that part of this apparatus which is the patented part. I think that the answer is that the Board of Admiralty is entitled to authorize E. Green & Son, Ld., to make, use and exercise that patented part on such terms, etc., as may be agreed, and that would, as I apprehend, include not merely financial terms, but also the terms that they would make, use and exercise it as part of a fuel economizer which they will supply to these destroyers on such terms financially as may be agreed. The second point I want to mention is this: it has been pointed out, again with great force, that the result of the view to which I have, with some diffidence, arrived is that Foster Wheeler, Ld., appear to have no remedy against the Crown. I think that is the case, so far as I can tell, though I must not be taken to be deciding that question. But, as appeared, I think, in the course of the argument, there may be other cases in which a person having some financial interest, or some other commercial right, would not be entitled to claim against the Crown any compensation, if the Crown exercised its rights and insisted on the benefit of the invention being placed at the service of the Crown on terms fair as between the Crown and the patentee. A third matter to which I refer is this: the Board of Admiralty have not been represented before the court to-day. In the view I take, which is adverse to the plaintiffs, it may be said that it does not much matter. But on a question of this kind, if the matter proceeds to the Court of Appeal, I cannot help thinking that that court may regard it as desirable that the Board of Admiralty should be represented by counsel as amicus curiæ, because, as I have already indicated, questions arise as to the form in which these authorities are given, and the Crown's position is, of course, vitally affected in the matter.

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(1) [1944] K. B. 629.

Having regard to my conclusion, it seems to me that this action must fail; but I wish to make it plain that, in dismissing the action, I am treating the alleged breaches as being confined to the cases referred to in the letter of the Director of Navy Contracts of January 22, 1945. So far as the evidence goes, no other authority has been given, and I am not to be taken as saying that, if any other authority in some different form is given, or if the defendants are invited to supply economizers to shipbuilders or other persons, that might not be outside the ambit of this judgment. Each case would obviously have to be decided on its own facts. I have no evidence before me of any other cases, and I express no view on any other matter, save only the supply of these economizers for the "Weapons" class destroyers comprised in this letter. In the circumstances the action fails with the usual consequences.

Solicitors: *Bristows, Cooke & Carpmael; Darley, Cumberland & Co.*

J. L. D.

In re DERHAM AND ALLEN, LIMITED.

COHEN J.
1945
July 2.

Company—Issue of shares at a discount—Solicitors instructed to obtain sanction of court—Issue in erroneous belief that sanction had been obtained—Rectification of register—Application to court for sanction of new issue—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 47, *sub-s.* 2.

A private company had a capital of 25,000*l.* held in 1*l.* shares, of which 3,000 were unissued. One of the four members, A., agreed to sell his holding to D. at a price to be ascertained by the auditors. The price fixed was 14*s.* 8*d.* per 1*l.* share, and D. asked W. to advance the purchase-money to him, which W. agreed to do on condition that the 3,000 unissued shares were allotted to him at the same price, being a discount of 5*s.* 4*d.* in the £. The company, mistakenly assuming that all legal requirements had been carried out by their solicitor in accordance with the directions given to him, allotted the 3,000 shares to W. and entered his name on the register. A year later the company's auditors discovered and pointed out that the sanction of the court to the issue of the shares at a discount under s. 47 of the Companies Act, 1929, had not been obtained. Thereupon the company cancelled the purported issue of 3,000 shares to W. and removed his name from the register, and then, having passed a new resolution for the issue of the 3,000 shares to W. at the same discount of 5*s.* 4*d.* in the £, petitioned the court for its sanction :—

Held, that the mistake made by the company having been one of fact, and not of law, the court would grant relief and sanction the proposed issue under s. 47, on the principle of analogous cases under s. 25 of the Companies Act, 1867, such as *In re Darlington Forge Co., Ld.* (1887) 34 Ch. D. 522, where a mistake of fact was proved.

At the date of the decision in *In re James Pitkin & Co., Ld.* [1916] W. N. 112, there was no legal means of issuing shares at a discount, and therefore the mistake made was one of law.

As a general rule, rectification of the register ought not to be effected without an order of the court, but in the special circumstances of this case the court did not think it necessary to require a separate motion to rectify the register.

PETITION.

The petition was presented by Derham & Allen, Ld., a private company, asking for the sanction of the court, under s. 47 of the Companies Act, 1929 (1), to the issue of 3,000 shares of 1*l*. each at a discount. The nominal capital of the company was 25,000*l*., held in 25,000 shares of 1*l*. each, and before August, 1942, the total issued capital of the company was 22,000*l*. in fully paid 1*l*. shares. Of these, 14,850 were held by Denis Derham, 4,850 by John Henry Allen, 1,150 by Frank Derham and 1,150 by Brotheridge, a nominee of Allen. Allen was desirous of retiring from the company and selling his shares. The articles of association contained a provision that when any shares were to be sold they should be offered to the other members of the company at a fair value to be fixed by the auditors. The company's auditors fixed the value of the 1*l*. shares at 14*s*. 8*d*. each, and Denis Derham, desiring to find a third party to bring in more capital, approached Mr. George L. H. White. White was willing to advance the money required to enable Derham to purchase Allen's shares at 14*s*. 8*d*. per share, provided that the unissued shares were issued to him at the same price, and it was realized at that time that the issue by the company of its 3,000 unissued shares at a discount could not be carried out without obtaining the sanction of the court. On May 17, 1942, a general meeting, at which all four members of the company were present, was held. The purchase of Allen's shares was concluded and transfers were executed by Allen to Derham. The meeting was then adjourned to August 27, and at this adjourned meeting it was resolved that White should be allotted 3,000 shares at the price of 14*s*. 8*d*. per share. Instructions were given to the company's solicitor to carry out the necessary legal formalities, but by an oversight in the solicitor's office no steps were taken to seek the sanction of the court, though the solicitor communicated with the Capital Issues Committee, and having ascertained that no consent of the Treasury was required for the proposed issue, he wrote a letter to the company's auditors, in which he informed them that the consent of the Treasury would not be necessary, and it would therefore be quite in order to issue the shares to White. The company thereupon treated the resolution of August 27 for the issue of the 3,000 shares as effective, and entered White's name on the register as the holder of those shares. In the return of allotments for the year 1942 the 3,000 shares were included as shares fully paid up in cash without reference to the discount. It was not until 1943 that the company's auditors, when preparing the annual return for that year, realized for the first time that the consent of the court to the issue of the shares at a discount had not been obtained, and therefore that the return of the allotments for the previous year was inaccurate. The company took advice as to the legal position, and were advised that the shares could not be regarded as being fully paid, and that White, as the holder thereof, was liable to pay the company an amount equivalent to the discount unlawfully allowed. White refused to assume this liability and the company, desiring to do what it could to rectify the result of its error, on November 24, 1944, by resolution in general meeting, cancelled the purported issue of 3,000 shares to White, and directed the removal of his name from the register as the holder thereof and then passed a fresh resolution for the issue of the 3,000 shares to White at the discount originally intended to be allowed. It now presented this petition for the court's sanction to the issue.

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(1) The Companies Act, 1929, s. 47, sub-s. (1): "Subject as provided "in this section, it shall be lawful "for a company to issue at a dis-"count shares in the company of "a class already issued: Provided "that—

"(*a*) the issue of the shares at "a discount must be authorized "by resolution passed in general "meeting of the company, and "must be sanctioned by the "court: . . . ."

Sub-s. (2): "Where a company "has passed a resolution authoriz-"ing the issue of shares at a "discount, it may apply to the "court for an order sanctioning "the issue, and on any such "application the court, if, having "regard to all the circumstances "of the case, it thinks proper so "to do, may make an order "sanctioning the issue on such "terms and conditions as it "thinks fit."

T. D. D. Divine for the company. Apart altogether from s. 47 of the Companies Act, 1929, under which the sanction of the court can now be obtained for the issue of shares at a discount, a contract to issue and take shares at a discount is not void, and the member who has agreed to take the shares can be called on to pay up the discount. But until the contract has been completed the purchaser can avoid it. This is so, even if he has been put on the register, provided he has not in fact assented to being so entered. See *In re Almada & Tirito Co., Ld.* (1), *In re Railway Time Tables Publishing Co., Ld.* (2)

(1) (1888) 38 Ch. D. 415. (2) (1889) 42 Ch. D. 98.

and *In re James Pitkin & Co., Ld.* (1). Once the contract is completed and membership of the company established, it cannot be repudiated on the ground that the member misunderstood the legal effect. But here the mistake was not of law, but of fact. The solicitor was instructed to take the necessary legal steps to validate the issue, and the members all believed that he had done so, whereas all he had done was to ascertain that no consent of the Treasury was necessary to the issue. Since the passing of the Act of 1929 a company can issue shares at discount under certain conditions, and the question whether those conditions have been fulfilled or not is a question of fact. A person who agrees to take shares at a discount in the belief that the company has proper sanction therefor, and discovers that this has not been done, is entitled to repudiate his contract. See the analogy of cases under s. 25 of the Companies Act, 1867, where it was held that unless the contract was filed before the issue of the shares, they must be deemed to have been issued for payment in cash. Where shares were allotted as fully paid, but there had been an omission to register the contract, the court ordered rectification of the register by striking off the allottees. See *In re New Zealand Kapanga Gold Mining Co., Ld.* (2), *In re Darlington Forge Co., Ld.* (3), *In re Maynards, Ld.* (4). It is submitted that the same principle applies where the omission has been to obtain the sanction of the court. No order for rectification is necessary, for if a person is entitled to repudiate his contract, and the company admits that he is, the directors can rectify without an order under s. 100. *In re Reese River Silver Mining Co., Ld.* (5), *In re Poole Firebrick and Blue Clay Co., Ld.* (6).

COHEN J. This is a petition of an unusual character. It is an application under s. 47 of the Companies Act, 1929, for leave to issue shares at a discount. One difficulty, however, in the way of the applicants is the decision of Eve J. in *In re James Pitkin & Co., Ld.* (1), where that learned judge held that a contract to issue and take up two hundred 1*l.* shares at 10*s.* each was illegal and void, but the applicant having assented to become a member of the company, it was too late to rectify the register on the ground of mistake as to the legal results.

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(1) [1916] W. N. 112.
(2) (1873) L. R. 18 Eq. 17 *n.*
(3) (1887) 34 Ch. D. 522.
(4) [1898] 1 Ch. 515.
(5) (1869) L. R. 4 H. L. 64, 74, 81.
(6) (1875) L. R. 10 Ch. 157.

It is to be observed that at the date of this decision of Eve J. there was no lawful means available to a company for the issue of its shares at a discount, and that therefore any mistake made by a company or a subscriber of shares in regard thereto could only be a matter of law. In the present case it was argued that the position has been different since the enactment of s. 47 of the Companies Act, 1929, because under that section shares may now be lawfully issued at a discount, and it is therefore a question of fact in any case whether the requisite sanction has or has not been obtained. I was referred by way of analogy to the cases in which, when s. 25 of the Companies Act, 1867, was in force, the court would relieve, by rectification of the register, a person whose name had been entered as the holder of shares which he had agreed to take credited as fully paid up, but in relation to which the company had omitted to file a contract pursuant to s. 25 of the Act of 1867. In those cases the court granted relief when it was satisfied that the applicant had acquiesced in the entry of his name in the register, in the mistaken belief that the contract had been duly filed. In *In re Darlington Forge Co., Ld.* (1) this relief was granted on evidence that the parties concerned had left all matters to be dealt with by the solicitors, and believed that all necessary steps had been taken, although it was not shown that the parties were aware of the nature of the particular steps necessary. Here I am justified in finding that Mr. White assumed that the legal requirements of s. 47 as to the issue of shares at a discount had been duly carried out, and the case would therefore be a proper one for the court to order the register to be rectified.

There is an unreported case which came before Bennett J. in 1938—*In re Crysède, Ld.* (000873 of 1937) in circumstances somewhat similar to the present case. There an order of the court had been obtained sanctioning the issue of shares at a discount, but some of the shares were issued after the time limited by the order within which the issue was to be made. On being advised that the issue of shares at a discount after the time fixed by the order was irregular, the company cancelled the allotment and resolved that a similar number of shares be issued at a like discount. The matter came before Bennett J. who declined to sanction the issue, but adjourned the petition to come on with a motion to rectify the register. The motion was brought on and with the leave of the court compromised on the terms of an agreement whereby, on the names of the allottees being removed from the register, they were to subscribe for shares equal in numbers to the irregular allotment, and the court proceeded thereafter to give fresh sanction for the issue of the shares at a discount.

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(1) 34 Ch. D. 522.

In the present case the company has taken upon itself to rectify the register without any motion to the court for that purpose, and in justification of this procedure I was referred to the judgment of Jessel M.R. in *In re Poole Firebrick and Blue Clay Co., Ld.* (1) and to *In re Reese River Silver Mining Co., Ld.* (2), which constitute authority for the proposition that where a person on the register of members has a right to rectification, and the company itself recognizes that right, it is not essential for a valid rectification of the register that an order of the court should be sought and obtained. I wish to say nothing to encourage directors to carry out rectification of a company's register without an order of the court being obtained in proceedings in which the right to rectification is duly established. The protection of the court's order is in the ordinary case essential to any rectification of the register by the removal of the name of a registered holder of shares, but in this case it was inevitable that the matter should come before the court, because it involved the sanction of the court to the issue of shares at a discount. I am satisfied that no one will be prejudiced, and I shall not require what would be a mere formality, that is to say, a motion to rectify the register. I will make the order asked for, sanctioning the issue by the company of 3,000 of its 1*l.* shares at a discount of 5*s.* 4*d.* per share.

Solicitors: *Walter J. Lark & Co., for A. E. H. Sevier, Derby.*

(1) (1874) L. R. 18 Eq. 542, 10 Ch. L. R. 157.

(2) L. R. 4 H. L. 64.

H. L. L.

UTHWATT J.
1945
June 5; July 27.

In re THOMAS.

PUBLIC TRUSTEE *v.* FALCONER.

Administration—Annuity—Direction to appropriate fund—Estate insufficient—Valuation of annuity—Abatement.

A testatrix bequeathed certain specific and pecuniary bequests and authorized her trustee to set up an annuity fund to provide an annuity of 104*l.* for A., payable by quarterly instalments, and directed that after A.'s death the capital of the fund should devolve in manner therein mentioned. The estate was insufficient to enable the trustee to make the various payments in full :—

Held, that, for the purposes of the abatement computation, a value must be attributed to the annuity fund and that, with regard to the sum allocated on the abatement valuation to that fund, the balance, after paying to the annuitant arrears of the annuity, must be applied in paying instalments of the annuity as they accrued due.

In re Nicholson [1938] 3 All E. R. 270, followed.

Wright v. *Callender* (1852) 2 De G. M. & G. 652, applied.

ADJOURNED SUMMONS.

By her will, dated July 27, 1937, Mary Jessie Thomas appointed the Public Trustee executor thereof and bequeathed to her niece, Mrs. Ruby May Falconer, " an annuity of 104*l.* " free of income tax and all charges of the Public Trustee " and directed her trustee to pay the annuity " free from income " tax and all charges as aforesaid " to the said Ruby May Falconer by equal quarterly payments. The will continued : " I authorize my trustee to provide for the payment of such " annuity by setting apart and appropriating in respect of " such annuity such part of my estate as shall in his opinion " be sufficient by the income thereof to pay such annuity and " I declare that when such appropriation shall have been made " the said annuity shall be wholly charged on the investments " so appropriated (hereinafter referred to as ' the annuity " ' fund ') in exoneration of the rest of my estate but that the " capital of the annuity fund may be resorted to in case at " any time the income thereof is insufficient to pay such " annuity and upon the death of the said Ruby May Falconer " I bequeath (free of duty) the said annuity fund (that is to say " the capital of the said fund and not by way of annuity) " to my niece, Mrs. Irene Marie Walker . . . . absolutely, " but if the said Irene Marie Walker predecease the said " Ruby May Falconer then on the death of the said Ruby May " Falconer I direct that the said annuity of 104*l.* shall be " accumulated and the accumulations and the capital of the " annuity fund paid to Marie Margaret Walker . . . . the " daughter of the said Irene Marie Walker on her attaining " the age of twenty-one years."

The testatrix also bequeathed various specific and pecuniary legacies including a legacy of 700*l.* to her niece Irene Marie Walker. The testatrix died on January 31, 1940. Having regard to the other dispositions in the will, the trustee, apprehending that the estate would be insufficient to enable a fund to be set up which would be adequate, by its income, to answer the annuity, took out a summons to obtain the directions of the court as to the proper administration of the estate.

Hubert A. Rose for the trustee.
Geoffrey Cross, *Lindner* and *H. E. Salt* for various defendants.

Cur. adv. vult.

July 27. UTHWATT J., reading a judgment, said: The net estate of the testatrix available to meet the pecuniary bequests is now of the value of approximately 3,500*l*. The provisions of s. 25 of the Finance Act, 1941, apply to the annuity, with the result that, as from April 6, 1941, the annuity is reduced to 71*l*. 14*s*. 6*d*., tax free, and taking into account the necessity of providing for the Public Trustee's income fee, the gross amount of the annuity, assuming tax to be 10*s*. in the £, is 143*l*. 10*s*. 0*d*. The sum now required to purchase an annuity of 143*l*. 10*s*. 0*d*. gross for the residue of Mrs. Falconer's life is 2,242*l*. 3*s*. 9*d*. The sum required to set up an annuity fund sufficient by its income to produce 143*l*. 10*s*. 0*d*. is approximately 4,122*l*., on the assumption that the annuity fund is to be composed of consols purchasable at 80*l*. There are arrears of the annuity also, amounting approximately to 520*l*. It is clear that full effect cannot be given to the provisions of the will. The available funds do not permit of payment in full of the legacies, arrears of the annuity and either the setting up of the annuity fund or payment of the actuarial value of the annuity. Abatement must take place. If the abatement computation takes the form that there enter into it legacies, arrears to date of the annuity and the annuity fund, the abated annuity fund would be roughly 2,700*l*. (subject to legacy duty). If the balance of that sum remaining (after meeting such of the arrears of the annuity to date as are not satisfied out of the sum attributed to those arrears on the abatement computation) were invested in consols at 80 and consols were at all times realizable at 80, the annuity could be met in full for more than the actuarial life of the annuitant. On the other hand, if the actuarial value of the annuity enters into the computation in lieu of the annuity fund and no regard is paid in the abatement computation to the interest of those interested in the annuity fund subject to the rights of the annuitant, the sum attributed to the annuity is short of the actuarial value by something of the order of ten per cent.

The first question raised is whether the sum required to set up the annuity fund is to enter into the abatement computation at all. On the true construction of the will, the provision as to the setting up of the annuity fund is, no doubt, in terms only a power, and the annuity fund finds its origin and amount in the annuity given to the annuitant. But in the light of the bequest of the capital of the annuity fund—itself given free of duty—it is to my mind clear that a non-exercise of the power would not prejudice those to whom the capital was expressed to be bequeathed and that, if the power were not in fact exercised, those persons would have had against residue a claim for the appropriate amount. I see no reason for accepting the view that because the amount of assets precludes an exercise of the power, the bequest of the annuity fund fails. The provision as to setting up the fund is not merely ancillary to the gift of the annuity. The value of the annuity fund must in my view enter into the computation. On this point there is a conflict of authority. In *In re Nicholson* (1) Crossman J. for purposes of the abatement computation attributed a value to the annuity fund. With his decision on this point I agree. Farwell J. in *In re Farmer* (2) and Bennett J. in *In re Wilson* (3) did not do so. In *In re Farmer* (2) the rights of the persons interested in the corpus of the annuity fund were treated as postponed not merely to the annuity, which clearly is right, but also to the legacies—a course for which no reason was given. Those legacies were paid in full and the annuitant was paid in full the actuarial value of the annuity. The balance—obviously less than the immediate value of the annuity fund—was paid to the persons interested in the corpus of the annuity fund. In *In re Wilson* (3), Bennett J. approved of *In re Farmer* (2) and put aside entirely the provision as to setting up an annuity fund and the direction as to its ultimate disposal. His decision proceeds on the footing that the direction to set up the annuity fund was merely subsidiary to the annuity and, in the light of the insufficiency of the estate to provide for the value of the annuity and the direct legacies, of no effect. The result was

(1) [1938] 3 All E. R. 270.

(2) [1939] Ch. 573.

(3) [1940] Ch. 966.

that not only was the bequest of the fund treated as worthless to those to whom it was bequeathed subject to the annuity, but the annuitant (in regard that the value of the annuity was less than the value of the fund) was in competition with the legacies deprived of the value to her of the rights against the annuity fund directed to be set up. I find myself unable to agree with either decision for the reason that in each case I think that the bequest of the corpus of the annuity fund was a substantive bequest for what it was worth.

The next question is whether, for the purpose of ascertaining the amount of the annuity fund, the capital sum should be ascertained on the basis of an investment in consols or on the basis that the fund is to be composed of investments yielding say three and a-half per cent. Crossman J. appeared to have proceeded on the latter footing in *In re Nicholson* (1) but the point does not appear to have been argued. In my view the rule of practice recognized in *In re Hollins* (2) should apply in this case, and accordingly the cost of an investment in consols—brokerage being disregarded, since no investment is in fact made—should be the basis. The value of the annuity fund is on this basis necessarily greater than the purchase price of the annuity from the Government (a result which would not in the case of a very youthful annuitant be true if a three and a-half per cent. basis were taken for the annuity fund) and accordingly it is that value which enters into the computation. That value embraces the value of the annuity.

Then comes a question as to the disposition of the sum allocated on the abatement calculation to the annuity fund. Obviously those interested under the gift of the corpus of the annuity fund can receive nothing unless and until the annuitant has been completely satisfied. It is not disputed that the arrears of the annuity—so far as not satisfied by the sum allocated to those arrears on the abatement calculation—have to be paid to the annuitant. The question is whether the balance—which is less than the actuarial value of the annuity—should be paid to the annuitant or whether that balance should be applied in paying instalments of the annuity in full as they accrue due. In my opinion the latter is the correct course. There is in hand an isolated fund that represents the annuity plus the expectant rights of those ultimately interested in the corpus. Is there any reason for splitting up the fund into two distinct parts ? I can see none. The position as regards the abated

(1) [1938] 3 All E. R. 270. (2) [1918] 1 Ch. 508

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THOMAS, *In re.* PUBLIC TRUSTEE *v.* FALCONER.

annuity fund is the same as that which obtains where a will contains merely a gift of an annuity (whether or not with a provision for setting up a fund) and a gift of residue. In such a case, if the estate is insufficient to enable the directions contained in the will to be carried out, the annuitant is not entitled to receive the value of his annuity but only to receive the instalments of his annuity as they accrue due. (*Wright* v. *Callender* (1).)

The circumstances of the case here do not necessitate a valuation of the annuity or payment to the annuitant of a capital sum in respect of her annuity. Without a valuation of the annuity the available fund has been ascertained. Without payment on the basis of a valuation the rights of the annuitant can be fully met—so far as funds admit. To make a valuation imposes on those interested in the corpus of the annuity fund the burden of paying an annuity for an average life—and an average life is as rare a thing as the average man—whereas the testatrix contemplated the burden of paying an annuity during the lifetime of this particular annuitant. Valuation is therefore not only unnecessary for purposes of administration, but imposes a charge on the abated annuity fund for an amount different from that intended by the testatrix. The rule as to valuation is not a rule of law ; it is a rule of administration in which effect should be given to the dictates of common sense (*In re Bradberry* (2)) ; *In re Hill* (3) is not directly in point, but the whole trend of the judgment of the Court of Appeal is directed to confining valuation to cases where circumstances require it. For these reasons I think the residue of the available fund should be applied in paying the instalments of the annuity as they accrue due. In *In re Nicholson* (4), Crossman J. adopted the course which I propose to follow. In *In re Farmer* (5) and *In re Wilson* (6) disregard of the provision as to the annuity fund entailed the former course, for no one but the annuitant was interested in the fund allocated in respect of the annuity.

These general considerations are, to my mind, sufficient to decide the point, but in the particular case there are features present which show the unreality of the valuation of the annuity. The annuity is given tax free and the rule in *In re Pettit* (7) applies to it. The valuation will assume under the

(1) (1852) 2 De G. M. & G. 652.
(2) [1943] Ch. 35.
(3) [1944] Ch. 270.
(4) [1938] 3 All E. R. 270.
(5) [1939] Ch. 573.
(6) [1940] Ch. 966.
(7) [1922] 2 Ch. 765.

UTHWATT J.

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THOMAS, *In re.*
PUBLIC TRUSTEE *v.* FALCONER.

present practice, (*a*) continuance of income tax at the rate of 10*s.* in the £ during the life of the annuitant and the consequent continuance of s. 25 of the Finance Act, 1941, and (*b*) that the annuitant or other the owner for the time being of the annuity will not at any time during the life of the annuitant be entitled to make any reclamation of British income tax and so come under an obligation to account to the trustees for a proportion of overpaid tax. Valuation on these assumptions—or some such assumptions—may in certain cases be necessary, but the guesses involved in the assumption do not invite adoption when another course is practicable and fair. It was urged that tax considerations suggested the propriety of satisfying the annuity by a capital sum. No doubt, if the annuitant lives long enough and tax remains at 10*s.* in the £, half the capital and income will be applied—in argument the word used was " dissipated "—in income tax. That no doubt is true. But the incidence of income tax is a matter which comes into play when rights are ascertained: it is not a matter to be taken into account in ascertaining rights. Tax considerations are irrelevant in deciding the point involved.

Solicitors: *Kingsford, Dorman & Co., for Leaning Carr, Clacton-on-Sea; Freshfields, Leese & Munns; Hopgood & Co.; Official Solicitor.*

J. L. D.

Overruled. Re WESTBY'S SETTLEMENT. [1950] 1 All E.R. 479.

Overruled. Re WESTBY'S SETTLEMENT [1950] 1 Ch. 296

COHEN J.

1945

June 15; *July* 11.

In re CUSTANCE'S SETTLEMENTS.

KEPPEL *v.* DOUGLAS.

Settlement—Protected life interest—" Become . . . . vested or charged " in favour of some other person . . . . or a corporation "—Receiving order under Lunacy Act, 1890*—" Percentage . . . . charged upon the estate . . . . and . . . . payable thereout "—Forfeiture of protected life interest—Discretionary trust brought into operation—Lunacy Act,* 1890 (53 *&* 54 *Vict., c.* 5), *s.* 148, *sub-s.* 3*—Lunacy Act,* 1891 (54 *&* 55 *Vict., c.* 65), *s.* 27, *sub-s.* 3*—Management of Patients' Estates Rules,* 1934.

By two settlements made at the same time in 1910, real and personal estates were settled for the benefit of D., then an infant, during his life after he should attain the age of twenty-five, except during such period as his estate or interest if absolute would have become by reason of any act or event, other than the exercise of a power, vested or charged in favour of some other person or persons or a corporation. During such excepted period the trustees of the settlement were to enter into possession of the rents, profits and income, and hold the same upon discretionary trusts for the benefit of D. or of his wife or children, if any, and subject thereto to apply the surplus of the said income to or for the persons to whom the same would be payable, if D. were then dead. D. was unmarried, and before twenty-one had become mentally defective, and receivers of his income had been appointed under the Lunacy Act, 1890. A receiver, who had acted without remuneration, died in 1944, and another receiver was appointed, and an order made for the payment to him of the fees and percentage on income payable under s. 148 of the Act :—

Held, that a charge on the income was thereby created, causing a forfeiture and the bringing of the discretionary trust into effect.

In re Marshall [1920] 1 Ch. 284, distinguished.

ADJOURNED SUMMONS.

On November 16, 1910, Colonel Custance and his daughter executed two settlements, one of realty and the other of personalty, under each of which a protected life interest, subject to previous life interests, was settled on the first defendant D., and subject thereto in favour of D.'s wife and issue, if any, with remainders over. The protected life interest in the case of the settlement of realty was as follows : " Subject " and charged as aforesaid to the use of the trustees during the " life of the first defendant upon trust that except while the " first defendant should be under the age of twenty-five years " or while his estate or interest in the hereditaments therein- " before appointed would if an absolute estate or interest " have become by reason of any act or event (other than the " exercise of any power thereby or by statute conferred on the " first defendant) vested or charged in favour of some other " person or persons or a corporation the original trustees or " the survivors or survivor or other trustees or trustee for the " time being of those presents should allow the first defendant " to enter into and remain in the possession and receipt of the " rents and profits of the hereditaments thereby appointed and " should during the excepted parts of the life of the first " defendant enter into and continue in possession or receipt " of the rents and profits of the hereditaments thereby settled " (with certain powers of management) and should so long as " they should remain in such possession or receipt as aforesaid " or such shorter period or periods either continuous or dis- " continuous as they should in their absolute discretion think " fit pay all or any part of the net estate (sic) and profits of "the said premises and apply the same for the maintenance "or personal support or benefit of all or any one or more to "the exclusion of the others or other of the following persons "namely, the first defendant and his wife (if any) and his "children or remoter issue for the time being in existence ". . . . as the trustees in their absolute discretion should "think proper and subject to the discretion trust or power "lastly thereinbefore contained should pay or apply the surplus "of the said rents and profits to the person or persons or for "the purposes to or for which the net rents and profits of the "said premises thereby settled would be payable or applicable "if the first defendant were dead."

The relevant provisions in the personalty settlement were similar, except that the event on the occurrence and continuance of which the income was not to be payable to the defendant D. was, if the income, if belonging to him absolutely, would be "vested in, payable to, or charged in favour of some "other person or persons or a corporation."

By his will dated August 26, 1925, Colonel Custance appointed the second defendant and the plaintiff Calvert to be executors and trustees thereof and bequeathed his residuary estate upon trust for his daughter for life, subject, however, to a certain provision for the first defendant. Subject to the life interest of the daughter the testator settled his residuary estate upon protective trusts for the first defendant, and subject thereto upon certain trusts for the benefit of his issue, the ultimate trust in default of issue being in favour of the second defendant. Colonel Custance died on September 29, 1925, and his will was duly proved on December 18, 1925, by both executors. The daughter died on February 13, 1944, and her husband died on March 21, 1945, so that the only persons in existence presently contingently interested in the settled funds were the first defendant and the second defendant. The first defendant was born on November 7, 1902, and had never married. Even before he came of age he was delicate and various orders were made under the Lunacy Act, 1890. On February 15, 1929, his mother was appointed receiver, and after her death on July 7, 1944, another receiver was appointed in her place.

The question raised by the summons was whether the appointment of the receiver and the payment to him of a percentage of the income under s. 148, sub-s. 3, of the Lunacy

Act, 1890, had effected a forfeiture under either of the settlements or the will, and brought the discretionary trust into operation.

Winterbotham for the plaintiffs.

Geoffrey Cross for the first defendant, D.: The appointment of a receiver and the payment to him of a percentage of the income for managing the property does not create any forfeiture so as to bring the discretionary trust into operation. The case is governed by *In re Marshall* (1) where Eve J. held that an order in lunacy appointing a receiver did not operate as a forfeiture, because the receiver was the statutory agent of the tenant for life to receive the income. And see *In re Walker* (2). The appointment of trustees as attorneys to receive income, and pay themselves their expenses out of it, is not an assignment, or charge so as to create a forfeiture. *In re Tancred's Settlement* (3).

Guest Mathews for the second defendant, C. Custance: On the construction of these settlements and in the events which have happened the defendant D. has never in fact become entitled as tenant for life in possession. This is not a life interest subject to determination in certain events. At all material times, even before he attained the age of twenty-one D. was mentally affected and unable to manage his own affairs. There are two different forms of words in the case of protective life interests. In one form the income is payable to the tenant for life, until he attempts to assign it, or some event happens to deprive him of the enjoyment of it. That was the form used in *In re Marshall* (1), which is distinguishable. The form used in these settlements is more like that used in the statutory protective trusts in s. 33 of the Trustee Act, 1925.

[COHEN J. I do not see how s. 33 of that Act can affect this case.]

The income is "charged" by s. 148, sub-s. 3, of the Lunacy Act, 1890, with a percentage of three per cent. payable to the receiver out of the income of the tenant for life and that is sufficient to cause this income to be held on discretionary trusts.

Cur. adv. vult.

July 11. COHEN J. read a judgment in which, after stating

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(1) [1920] 1 Ch. 284.

(2) [1905] 1 Ch. 160.

(3) [1903] 1 Ch. 715, 724.

COHEN J.

1945

CUSTANCE'S SETTLEMENTS, *In re.* KEPPEL *v.* DOUGLAS.

the terms of the settlements and the will and referring to s. 148 of the Lunacy Act, 1890 (1), he continued: Under that Act the mere appointment of a receiver did not bring s. 148 into operation, but by sub-s. 3, of s. 27, of the Lunacy Act, 1891, "the power conferred by s. 148 of the principal Act to "make rules fixing percentage and fees shall be deemed to "extend to all proceedings under the principal Act or this "Act, whether relating to lunatics so found by inquisition "or to any other person in relation to whom or to whose "property an order under the said Acts has been or may be "made." The effect of that, of course, was to make the mere appointment of a receiver sufficient to bring the Act into force. The Lord Chancellor exercised the power conferred on him by s. 148, sub-s. 1. The relevant rules now in force are The Management of Patients' Estates Rules, 1934, under which the percentage in the case of a lunatic not so found by inquisition is a percentage of three per cent. per annum. Under r. 152, the master has to "certify the amount of "percentage payable in each case and the person who is to "pay the same, and the time within which the same is to be "paid, and such person shall pay the same out of the first "money coming to his hands on account of income." By r. 154, the percentage account is to be opened in the Accountant-General's office, the amount to the credit of the percentage to be dealt with in accordance with the Supreme Court Fund Rules. Under r. 3 thereof, the sum placed to the credit of that account, amongst other accounts, is to be from time to time transferred to the Paymaster-General's cash account to the credit fund of the Supreme Court or otherwise as the Treasury may direct. That being the state of the law, it is clear, firstly, that the income (if any) to which the first defendant is entitled became payable to the receiver and,

(1) By the Lunacy Act, 1890 (53 & 54 Vict., c. 5), s. 148, sub-s. 1: "The Lord Chancellor, with the "concurrence of the Treasury, "may make rules fixing the per"centage and fees payable in "proceedings relating to lunatics "and their estates, and regulating "the mode in which the same are "to be ascertained and paid."

Sub-s. 3: "The percentage, or "a proper proportionate part "thereof (as the case may re"quire), shall be charged upon the "estate of a lunatic, and be "payable thereout, although "before payment thereof he die, "or the inquisition be super"seded, or be vacated and dis"charged on a traverse; but in "either of the two last mentioned "cases the Judge in Lunacy may, "if he thinks fit, remit or reduce "the amount of the sum to be "paid."

secondly, that a charge on the estate of the first defendant was created under s. 148, sub-s. 3, by reason of the appointment of the receiver.

It is, I think, established by authority binding on me that the mere fact that the income is payable to the receiver does not bring the discretionary trust into operation; see *In re Marshall* (1), where Eve J. said: "The first question is "whether that order"—I think it was an order appointing the receiver—"itself operated as a charge on the income of the "fund of 6,000*l.* or as a direction to pay the same to another "person, and thereby put an end to the plaintiff's interest in "that income. It is admitted, however, that this contention "cannot be successfully put forward. The person appointed "to act as a receiver under s. 116 of the Lunacy Act, 1890, is "not strictly a receiver but the statutory agent of the person "of unsound mind, and his receipt is receipt by such person "and certainly not the less so where, as in this case, the whole "income is directed to be applied for the maintenance of such "a person." But in that case the attention of the court was not directed to s. 148, sub-s. 3, and it is argued that since s. 148, sub-s. 3, clearly creates a charge on the income of the first defendant, it must necessarily bring the discretionary trusts into operation. Mr. Cross did not dispute that the section created a charge, but he argued that this charge was to secure payment of expenses reasonably incurred in the management of the estate, and that a charge of this kind was not within the mischief against which the discretionary trust was intended to guard. He could cite no authority directly in point, but relied on the decision in *In re Tancred's Settlement* (2). The material facts are sufficiently set out in the last paragraph of the headnote to that case as follows: "A person entitled to a life interest, determinable if he should "dispose or attempt to dispose of it, assigned it to the trustees "of his marriage settlement upon trusts under which he was "to receive the income for life. By the settlement he "appointed the trustees his attorneys to receive the income, "and gave them power to pay the expenses of managing the "trusts: *Held*, that this was not a disposition or attempted "disposition of his life interest so as to cause it to be "forfeited." Buckley J. as he then was, said (3): "It is "said that under the clause which authorizes payment of

(1) [1920] 1 Ch. 288.
(2) [1903] 1 Ch. 715.
(3) Ibid. 724.

"the charges and expenses of the trust the trustees would have "a right to look to this fund for recoupment of their expenses, "and that that is a disposition or attempted disposition of "the income whereby it would become 'payable to or vested "'in some other person.' In my opinion it is not. The "clause is intended to provide that, if a tenant for life disposes "or attempts to dispose of his interest so as to lose the enjoyment of it himself, or if he should become bankrupt, his life "estate should cease and be given over to others. This has "not happened. Seymer Mitford Tancred remained after the "settlement the only person entitled to the income. The "mere fact that the trustees may be entitled to have their "expenses recouped to them out of the income does not make "it a disposition within the clause. It is parallel to the case "of a person who is going abroad and appoints somebody to "collect his rents on the terms that he should be paid by "deducting a commission. Neither is the appointment of "the trustees to be his attorneys to recover the income an "assignment. He only appointed them to act as his agents, "retaining the beneficial interest himself." Mr. Cross suggested that the fees payable under s. 148 might be treated as being on a par with remuneration to an agent, and therefore within the principle of this decision. I do not think I can accept this argument. Had the charge been for the remuneration of the receiver the argument might have been well-founded, but I think I should be straining the law too far if I were to hold that fees payable to the percentage account and applicable as part of the vote for the Supreme Court of Judicature were analogous to remuneration to an agent appointed by act of party or by statute. In the course of the hearing I raised the question whether the charge created by s. 148, sub-s. 3, could be said to be a charge in favour of a person or corporation, but Mr. Cross intimated to me that he thought the government officer entitled to receive the money must be either a person or a corporation within the meaning of the clauses under consideration.

There are two other points that I should perhaps mention: First, that as it occurred to me that the Crown might be interested in the result of this decision, by my request the plaintiffs caused a communication to be sent to the Attorney-General to see if he desired to be represented. Having been informed about the case, he said that Mr. Cross had said all there was to be said in any argument the Attorney-General would desire to put forward, and he was content not to appear. The other point is that Mr. Cross suggested that if I were to decide the case as I have done, I should be defeating the intention of numbers of testators. I think I must construe the clause and the section in accordance with their provisions. I would only say that so far as this particular will and this particular testator is concerned, having regard to the fact that the first defendant was weak of intellect in the testator's lifetime, and that the result of my deciding the case differently from what I have done would be to divert the property, or so much of it as was not for the maintenance of the lunatic, away from the testator's family to the first defendant unless he recovered, I cannot think in this particular case that I am in any way defeating the intention of the settlor. But, as I have said, I do not think that can affect the conclusion to which I have come.

For the reasons I have indicated, I propose to declare that: "On the true construction of the first above-mentioned "settlement"—that is, the real property settlement—"and "in the events which have happened, the income of the "property and investments now representing the proceeds "of sale of the real property settled by such settlement is "held by the plaintiffs as trustees of such settlement upon the "discretionary trusts set forth in cl. 1 (*c*) of the said "settlement"; and I shall make corresponding declarations under paras. 2 and 3 of the summons, but I do not think it is necessary for me to read them in detail. The costs of this application between solicitor and client must be taxed and paid in equal thirds out of the funds subject to the two settlements and the will.

Solicitors: *Sharpe, Pritchard & Co., for Foster, Calvert & Marriott, Norwich; Gilbert Samuel & Co.*

H. L. L.

In re PALMER, DECEASED.

GREENWOOD *v.* PALMER.

UTHWATT J.
1945
July 11.

Will—Construction—Legacy duty on shares of residue—Direction to pay "death duties"—Duty on shares payable at different rates—Whether shares of residue given free of duty or not.

A testator who by his will gave several pecuniary legacies free of duty and one specific legacy not free of duty, gave his real

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and personal estate upon trust for conversion, and out of the proceeds of sale and his ready money to pay his funeral and testamentary expenses, death duties and debts and pay or provide for legacies. The residue was to be divided into three shares, one settled on his wife for life and then to his son after attaining the age of twenty-five years, another to his son absolutely, and the remaining third for his mother and brother in equal shares. After the date of his will the testator divorced his wife. The legacy duty payable on the different shares varied from 1 per cent. in the case of the son to 10 per cent. in the case of the former wife:—

Held, that having regard to the place where the general direction to pay death duties was found the testator's residuary estate must be ascertained for the purposes of division, without making any deduction therefrom for legacy or succession duty, and then divided into three equal shares, leaving each share to bear its own duty.

In re King [1942] Ch. 413, 419 applied.

ADJOURNED SUMMONS.

The testator, Bernard Gore Palmer, by his will dated May 16, 1942, after appointing executors and trustees, bequeathed to each of the two executors 20*l.* free of duty. Then he gave three legacies each of 500*l.* free of duty. By cl. 4, he gave his real and personal estate upon trust for sale and conversion in the usual form. By cl. 5 he provided as follows: "My trustees shall out of the money to arise from "the sale and conversion of my real and personal estate and "out of my ready money pay my funeral and testamentary "expenses death duties and debts and shall also pay or provide "for the legacies hereby or by any codicil hereto bequeathed." By cl. 6 he directed: "My trustees shall hold the residue of "the said moneys and the investments for the time being "representing same (hereinafter referred to as my trust fund) "upon the following trusts namely:—(i.) As to one third "thereof to pay the income arising therefrom to my said "wife during her life and after her death both as to capital and "income upon trust for my son John on his attaining the age "of twenty-five years for his own use absolutely. (ii.) As to "one third thereof upon trust as to both capital and income for "my said son John on his attaining the age of twenty-five "years for his own use absolutely. (iii.) As to the remaining "one third thereof upon trust in equal shares for my said "mother and my said brother absolutely." Then he provided for what was to happen to that share in the event of his mother dying in his lifetime. By cl. 7 he gave and bequeathed to his trustees all his furniture and personal chattels as defined in the

Administration of Estates Act, 1925, upon trust for his mother and brother in equal shares absolutely. This legacy was not given free of duty. After the date of his will the testator divorced his wife therein mentioned, and died in April, 1943.

The question raised by the summons was whether or not the legacy duty payable in respect of the gift of shares of residue ought to be borne by the capital fund before those shares were ultimately ascertained, or whether theoretically the residue should be ascertained without regard to the incidence of legacy duty upon the beneficial interests therein, leaving the persons entitled to beneficial interests in the residue to bear their own duty thereon. The legacy duty was payable at the rate of ten per cent. on the former wife's interest, one per cent. on the son John's interest, one per cent. on the mother's, and five per cent. on the brother's. As regards John's interest, the duty payable by him on the corpus would be payable only on the event of his attaining twenty-five years of age, and on the income as and when the income was paid. If John did not attain twenty-five, the share given to him would devolve as on an intestacy, and duty at a different rate would become payable. John was in his infancy.

Wolfe for the plaintiffs (trustees).

S. Campbell for the defendant Victoria Annie Palmer, former wife of the testator. The direction to pay " death duties " refers not only to estate duty, which is properly included under " testamentary expenses," but also all legacy and succession duty, payable on legacies or shares of residue. All the pecuniary legacies are given free of duty. The testator intended these shares of residue to be given free of duty. The whole of the legacy duty on the residue should be first paid, although the rates of duty may differ, and the clear residue divided into three parts, and dealt with in accordance with the will. See *In re King* (1).

Guest Mathews for the testator's brother W. Palmer supported this argument.

Michael Bowles for the testator's son John Palmer. The proper course is to ascertain the residue in the ordinary manner, and then divide it into thirds and let each third bear its own duty. The testator has expressly given some legacies free of duty and one, of furniture and chattels, not free of duty. If argument of counsel for the former wife is sound, it would be

(1) [1942] Ch. 413.

unnecessary in this will to give any legacies free of duty. The words "death duties" can only refer to legacy (or succession) duty on legacies not expressly given free of duty. It cannot refer to legacy duty in shares of residue. It would not be possible to ascertain at present the duty on the share settled on Mrs. Palmer for life and subject thereto on John, if and when he should attain twenty-five, and a reserve would have to be created to pay this duty at some future time. The decision in *In re King* (1) is in favour of this contention.

UTHWATT J. stated the facts and continued: The question is purely one of the construction of the particular will before me. I agree with Mr. Campbell's argument to this extent, that it is open to a testator to provide by apt terms that the duty on shares of residue shall be paid or provided for out of the whole fund before the several shares of residue are ascertained for the purpose of fixing finally what the beneficiaries should get. It is open, therefore, for testators to make such provisions, and it is mathematically possible to work out those provisions even where the duties are payable by persons in succession and payable at different rates. But that necessarily would involve, having regard to the way in which duty is computed, in this case, the setting up of some kind of reserve fund, the exact destination of which could not be determined until the claims of the revenue had been completely satisfied as regards duty on the residue. So much for the general proposition.

The second proposition is purely a matter of construction of the will, and that is whether any such provision has been made here at all. The only phrase which is relied on is a phrase consisting of two words "death duties" included in the direction contained in cl. 5 that they are to be paid. When one looks at the will, one has this fact to start with, that there are legacies given free of duty, and there is a legacy which is not expressed to be given free of duty. One has this further fact, that there is no express direction as regards the freedom from legacy duty of the various shares in residue. The provision relating to "death duties" occurs in a direction to the trustees as to the course which administration should pursue, and is not in substance directed to creating beneficial interests. The funeral and testamentary expenses have to be paid whether a direction is given or not;

(1) [1942] Ch. 413, 419.

so also have debts. Legacies have to be paid apart from this direction. Again, all death duties have to be paid independently of any direction, because unfortunately it is not competent to the testator to rid his estate of the liability to pay them. So that it is wholly a matter of machinery and direction to the executors and trustees as to what they are to do. That is the second fact. The third matter is this—and I have already referred to it in part—that if the phrase " death duties " is extended to cover legacy and succession duty payable in respect of the various interests in residue, that direction creates an obstacle in the way of the ready ascertainment of the exact amount of the various shares in the residue.

This point has come before the courts from time to time, and, in my opinion, it is in substance covered by part of a decision of the Court of Appeal in *In re King* (1). In that case the testator's wife was given a house, " Pashley," duty free, and she was also given a freehold messuage, " Shirley " Hall," without any reference to the duty upon it. There was contained in the will a general direction to pay out of the residuary estate " all duties payable in respect of my estate." One of the questions at issue was whether or not that general direction covered duties payable in respect of " Shirley Hall " —that would be estate duty and, I think, succession duty. The matter was dealt with towards the end of the judgment of the court. Luxmoore L.J. said (2) : " Reliance was placed " on an alternative argument based on the provisions of cl. 9 " of the will, directing that ' all duties payable in respect of my " ' estate ' should be paid out of the proceeds of sale and " conversion of what the testator had defined as ' my trust " ' property,' that is, the real and personal property not " specifically disposed of. It is difficult to read this as being " intended to free all the specific gifts and legacies from " liability to duty, where, as in this case, the testator has " expressly freed some of his gifts from duty and has not done " so in other cases. In cl. 7, for instance, the testator is silent " as to the incidence of duty in respect of the benefits given to " the wife in Danemore Park," and so on. Then he goes on : " In our opinion, the question in the present case is : Ought " the words in cl. 9, ' all duties payable in respect of my " ' estate,' to be construed without regard to the fact that " certain dispositions in the testator's will are in express terms

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(1) [1942] Ch. 413. (2) Ibid. 419.

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"given free of duty while other dispositions in the will and the "first codicil are not expressed to be so given, or ought the "words referred to to be construed having regard to that fact? "If the former method of construction is correct, then every "disposition taking effect at the testator's death would be "freed from liability for duty although the testator has "apparently in cl. 7 and in the first codicil treated some of "his testamentary dispositions differently from others in "respect of freedom from duty. In our view, the latter method "of construction appears to be the safer, for it gives effect to "the express directions of the testator and avoids treating the "expressions with regard to the freedom of particular benefits "from duty as being tautologous."

I think I am bound by the decision in that case, but, whether I am so bound or not, I myself am of the opinion that upon the construction of this will, having regard to the place in which this direction as to death duties is found, to the generality of the term, and the circumstance that certain legacies are given free of duty, while one is not, the direction contained in cl. 5 does not extend to, or is not an expression of intention to, free the various interests in residue from liability to legacy duty to which they are subjected by the ordinary law and which they themselves must bear, unless other provision for their satisfaction is made. The declaration will be that the testator's residuary estate should be ascertained for the purpose of division in accordance with the trusts of the will without making any deduction in respect of the liability to succession duty or legacy duty in respect of any interest therein.

Solicitors: *Oldman, Cornwall & Wood Roberts, for Charles Greenwood & Co., Peterborough; Whittington, Son & Barham.*

H. L. L.

UTHWATT
J.

1945

Oct. 12, 30.

In re GRIMWOOD: TREWHELLA *v.* GRIMWOOD.

Will—Construction—Bequest of " all my plate."

A testatrix, who died in 1941, bequeathed " all my plate " to two nephews:—

Held, that the meaning of the word " plate " in the will was not restricted to articles of gold or silver and that no article was excluded from the bequest by reason of its being Sheffield plate or electro plate.

Holden v. *Ramsbottom* (1863) 4 Giff, 205 not followed.

UTHWATT J.
1945
GRIMWOOD, *In re.*
TREWHELLA *v.* GRIMWOOD.

ADJOURNED SUMMONS.

By cl. 3 of her will, dated July 19, 1934, a testatrix, who died on April 26, 1941, bequeathed to two nephews " all my plate to " be divided between them as equally as may be." At the date of her death the testatrix had in her possession, in addition to silver articles, a number of articles of Sheffield plate and electro plate. A summons was taken out by the executor of the will to determine whether the bequest included only articles of silver or gold, or whether it also comprised silver plated articles or some other and what articles.

J. B. Richardson for the plaintiff.

Fawell ; G. D. Johnston ; S. Pascoe Hayward ; Victor Coen ; Wilfrid M. Hunt ; W. F. Waite ; J. W. Brunyate ; and *Winterbotham* for various defendants.

Cur. adv. vult.

Oct. 30. UTHWATT J., read a judgment, in which he stated the facts and continued : To my mind neither the other parts of the will nor the later testamentary documents executed by the testatrix give any help in determining what meaning is proper to be attributed to the word " plate " in cl. 3. It was argued, on the authority of *Holden* v. *Ramsbottom* (1), that nothing but silver passed under the description " plate." In that case the testator bequeathed to a beneficiary " All the furniture except " plate and pictures, which may be in the said house at my " decease." The testator possessed at his house a plated service and at his bank a solid silver service and other silver articles. It was conceded that, but for the exception, every article of " plate " would have passed under the description of " furniture." The learned judge decided that only the silver was excepted. He took the view that there was " nothing " in the context of the will, or in the evidence as to the " situation of the testator with regard to the time of gift, " legitimately to show that the word was not used in its proper " sense " ; and that " plate " properly so called did not include plated articles. That is the only relevant authority. It was decided in 1863, and, although the " sixties " have been

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(1) (1863) 4 Giff. 205.

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described as the age of stucco and electro plate, I find myself unable to accept this limitation on the proper meaning of the word "plate" in a will made in the year 1934. A reference to the Oxford English Dictionary shows the meanings currently attributed to the word. The relevant entry runs as follows: "*Collective sing.* "Utensils for table and domestic use, ornaments, etc., *a.* "originally of silver or gold . . . . *b.* Extended to plate ware and "to other kinds of metal: usually with distinctive additions, "as pewter plate, British plate, electro plate, etc." This of course, is more a description of the common use of the word than an attempt at a definition of it and, for my purpose, the value of the entry lies in that fact. To my mind, at the present day the ordinary person using the word "plate" or reading the word "plate" as it appears in such a document as that before me, would not have in mind only articles composed of silver or gold, and would understand the word "plate" in the extended sense attributed to it by the makers of the Oxford English Dictionary as including plated articles. It is not uncommon for a word to change its meaning and in the case of the word "plate" it is clear that this has happened. Reasons may be suggested for this change. Plated ware in many forms has become available to the whole mass of the population; there is a settled habit of applying to new articles of secondary worth a name which properly belongs to superior articles of the same general character and serving the same purpose as the new articles; and, lastly, the new articles, serving the purpose of "plate," as formerly understood, are produced by "plating." To some, indeed, the word "plate" if used in ordinary conversation would suggest electro plate as distinct from silver or Sheffield plate. In my opinion therefore no article is excluded from the category of "plate" in this will by reason that it is Sheffield plate or electro plate.

Solicitors: *Patersons, Snow & Co. for Holmes & Hills, Braintree; Stanley Attenborough & Co.; Sharpe, Pritchard & Co., for Howard Gates & Ridge, Hove; Howard, Kennedy, Genese & Co., for Burnand & Burnand, Hove; Bull & Bull.*

J. L. D.

um of LORD GREENE, M.R., at
3, *dissented from.* ZEIDMAN *v.*
N. [1950] 1 All E.R. 290.

Not followed. ZEIDMAN *v.* OWEN
[1950] 1 K. B. 593

ELDERTON AND ANOTHER *v.* UNITED KINGDOM TOTALISATOR COMPANY, LIMITED.

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Oct. 22, 23, 24.

Lord Greene M.R., du Parcq and Morton L.JJ.

Gaming—Football pool—Advertisement in newspaper—"Competition in "which prizes are offered for forecasts of the result of a future event." Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 26, *sub-s.* 1 (*a*).

The defendant company were promoters of football pools, which were conducted on a credit basis. An advertisement inserted in a newspaper consisted of a coupon in which the intending participants were invited to make their entries in five separate pools, the stake money to be sent after the matches on which they were invited to bet had been played. The promoters deducted from the stakes received their expenses and a fixed percentage for their profits. The balance in each pool was divided in certain specified proportions among those who made the most successful forecasts:—

Held, that the football pools so conducted were "competitions "in which prizes were offered for forecasts of the result of a future "event," and that the conduct of them through a newspaper was therefore prohibited by s. 26, sub-s. 1 (*a*) of the Betting and Lotteries Act, 1934.

Bretherton v. *United Kingdom Totalisator Co., Ld.* [1945] K.B. 555 followed. *Elderton* v. *United Kingdom Totalisator, Ld.* [1935] Ch. 373 overruled.

APPEAL from Uthwatt J.

The defendant company, United Kingdom Totalisator Co., Ld., as part of its business conducted football pools, and it inserted in a newspaper called the *Winner* an advertisement of such football pools, consisting of a coupon, on which persons desiring to participate in the pools were invited to make their entries. The coupon contained details of a number of different pools—in one, the participant was required to forecast eight correct results in named football matches to be played on a certain future date; in another, called the points pool, he was asked to forecast whether each match in a list would be won by the home team (one point), the away team (two points), or drawn (three points), and the person scoring the largest number of points for correct forecasts received seventy per cent. of the money staked in that pool, the next most correct twenty per cent., and the third ten per cent. Before dividing the stakes the promoters deducted their expenses as certified by their accountants, and a fixed percentage as their profits. In the points pool it was possible for a person with fewer correct forecasts to win against a person with more, if they were drawn games or won by away teams. The rules provided that the stakes should not be sent with the forecasts, but after the results were known, and the usual practice was for regular participants to remit any amounts due in respect of one week with their entry for the next week.

The question whether these advertisements were legal, having regard to s. 26, sub-s. 1 (*a*) of the Betting and Lotteries Act, 1934 (1) was raised in *Elderton* v. *United Kingdom Totalisator Co., Ld.* (2), when Eve J. held that they were legal. But in *Bretherton* v. *United Kingdom Totalisator Co., Ld.* (3) the Divisional Court declined to follow Eve J., and held that they were illegal. The present was a friendly test action in which two directors and shareholders of the company claimed an injunction restraining the company from conducting any football pool as advertised in the issue, dated February 26, 1944, of the *Winner*, or any football pool based on the same or similar principles in or through any newspaper. They alleged that the defendants were conducting through the *Winner* a competition in which prizes were offered for forecasts of the results of future events, contrary to s. 26, sub-s. 1, of the Betting and Lotteries Act, 1934, and that they (the plaintiffs) were in danger of being prosecuted under that section in consequence. The defendants denied that the advertisements were unlawful and that the plaintiffs were put in jeopardy thereby. Uthwatt J. followed the Divisional Court, and held that the advertisements were illegal. The defendant company appealed.

At the trial the defendants had sought to put in evidence bound volumes of the *Winner* to show their practice before the passing of the Act of 1934, and the change made thereafter, in order to comply with that Act, by dropping certain prize competitions which they used to conduct in addition to, and separate from, the pools. Uthwatt J. declined to admit this evidence.

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(1) The Betting and Lotteries Act, 1934, s. 26, sub-s. 1 (*a*): "It shall be unlawful to conduct "in or through any newspaper, or "in connexion with any trade or "business . . . . (*a*) any competi-"tion in which prizes are offered "for forecasts of the result . . . . "of a future event. . . . Pro-"vided that nothing in this sub-"section with respect to the "conducting of competitions in "connexion with a trade or "business shall apply in relation "to pari-mutuel or pool betting "operations carried on by a per-"son whose only trade or business "is that of a bookmaker. . . . ."

(2) [1935] Ch. 373.

(3) [1945] K B. 555.

Beyfus K.C. and *Lindner* for the defendant company. This action is brought for the purpose of obtaining the decision of this court whether the view of Eve J. in *Elderton* v. *United Kingdom Totalisator Co., Ld.* (1) or of the Divisional Court in *Bretherton* v. *United Kingdom Totalisator Co., Ld.* (2) is correct. That is the method which was employed in *Sutters* v. *Briggs* (3), which was brought to test the decision of this court in *Dey* v. *Mayo* (4). At the trial we sought to adduce past volumes of the *Winner*, and we again do so. Before 1934 the defendants also ran prize competitions. They were quite different in their legal status from pools. In the pools it is quite immaterial to the promoters what are the results. The only thing that matters to them is the turnover, on which their profits are based. In the prize competitions they had an interest in the results of the matches, as if no forecast was correct they did not have to pay the prize money. As to the admissibility of the evidence, see *River Wear Commissioners* v. *Adamson* (5) and *Abrahams* v. *MacFisheries, Ld.* (6). [The court declined to receive the evidence.]

Section 26 prohibits the conduct of prize competitions (1.) in any newspaper; (2.) in connexion with any trade or business; (3.) in connexion with the sale of any article. The proviso applies only to (2.). In the court below, counsel for the plaintiffs sought to say that since pari-mutuel or pool betting operations are excepted in certain circumstances by the proviso they must be within the words "competition in which "prizes are offered." That argument was rejected by the Divisional Court, but Uthwatt J. seems to have accepted it.

It is wrong to construe the clear words of the operative part of s. 26, sub-s. 1, of the Betting and Lotteries Act, 1934, by reference to the ambiguous proviso. But in fact the proviso assists the defendants' contention rather than that of the plaintiffs. It is a distortion of words to talk of pool betting transactions as a competition in which prizes are offered. It is true of all betting, including pari-mutuel, to say that the object is to make a more accurate forecast than your fellows, the dividend received varying with the number of other people who are right. The pool betting in question here is a betting between all the people entering depending on the amount paid by the various persons, subject to the deduction made by the

(1) [1935] Ch. 373.
(2) [1945] K. B. 555.
(3) [1922] 1 A. C. 1.
(4) [1920] 2 K. B. 346.
(5) (1877) 2 App. Cas. 743.
(6) [1925] 2 K. B. 18.

company as promoters. The material authorities are *Att.-Gen.* v. *Luncheon & Sports Club, Ld.* (1); *Elderton* v. *United Kingdom Totalisator Co., Ld.* (2), where pool betting was held by Eve J. to be valid; *Bretherton* v. *United Kingdom Totalisator Co., Ld.* (3) where the Divisional Court took the contrary view. [DU PARCQ L.J. Your case is that pool betting is a betting operation and therefore not a competition for a prize, but the proviso to s. 26, sub-s. 1, is relied on against this view.] If the legislature wished to prohibit pool betting, why did it not say so? In any case the proviso is ambiguous and ought not to be used to construe the clear part of the section; see per Lord Herschell in *West Derby Union* v. *Metropolitan Life Assurance Co.* (4). This court must have regard to the Act as a whole, and a penal provision being in question the court ought of two possible constructions to adopt the more lenient one: *Tuck & Sons* v. *Priester* (5).

Valentine Holmes K.C. and *Pascoe Hayward* for the plaintiffs. The proviso to s. 26, sub-s. 1, makes it clear that pool betting and pari-mutuel may be competitions for prizes by making a special exception of pool betting and pari-mutuel carried on by bookmakers. But even if there were no proviso, pool betting would still be within the sub-section as being a competition in which prizes are offered. It is material to consider the nature of the pool betting carried on by the defendants. Thus the second competition involves filling up forecasts of twelve results and different numbers are given as the correct forecast is as regards each match of a win by a home team, a win by an away team or a dead heat. It is on the total of the numbers earned in respect of the twelve matches that prizes are offered, not on obtaining the largest number of correct results. If this be not a competition, it is hard to think what is. Further, the total amount to be sent in on the competition in the following week is only paid out after deduction of five per cent. and an uncertain amount for expenses, which are not necessarily the expenses of the particular week, the object presumably being to give sufficiently attractive prizes. Further, such large prizes are won that the odds regarded as a bet would be astronomical. The difference between this and pool betting, properly so-called, is that here the question whether the entrant wins or not, unless he is a hundred per cent. correct, depends on the forecasts of other entrants, and is in that sense competitive.

(1) [1929] A. C. 400.
(2) [1935] Ch. 373.
(3) [1945] K. B. 555.
(4) [1897] A. C. 647, 655.
(5) (1887) 19 Q. B. D. 629, 638.

[*Kelly* v. *Murphy* (1) was cited.] The reasoning of Eve J.'s judgment in *Elderton* v. *United Kingdom Totalisator Co., Ld.* (2) seems to have proceeded thus: (i.) The House of Lords in *Att.-Gen.* v. *Luncheon & Sports Club, Ld.* (3) decided that pool betting is betting inter se; (ii.) This is pool betting; (iii.) Therefore it is betting inter se; (iv.) a man who bets with another or others does not regard the money he wins as a prize. The fallacy, it is submitted, is that the House of Lords in *Att.-Gen.* v. *Luncheon & Sports Club, Ld.* (3) did not decide "in the air" that all pool betting was betting inter se. The question was whether on the facts of that case the members of a particular club were betting inter se, or with the club. That decision is of no assistance in this case.

Beyfus K.C. replied.

LORD GREENE M.R. Mr. Beyfus, quite properly, argued that the section, the construction of which is in controversy in this case, creates a criminal offence, and he pointed out that where a criminal offence is created it should be created in clear language. The present language, he said, was at the best so ambiguous that we ought to construe it in such a way as to restrict the ambit of the offence which the section creates. But the rule with regard to the construction of sections which create a criminal offence is not to be used to restrict the scope of the section where wide and comprehensive language is used, not in terms of art, but in terms of ordinary English, which are sufficiently broad in their meaning to cover the particular operation in question. In my opinion, that is the case in this instance. The legislature has used wide and comprehensive language, which has no technical meaning and must be construed according to the ordinary rules.

It is said, and has been held by Uthwatt J. that the football pools which are here in question fall within the language of s. 26, sub-s. 1, of the Betting & Lotteries Act, 1934, and constitute a competition in which prizes are offered for forecasts of the result of a future event. Nothing turns on the question whether they are forecasts of the result of a future event, for they are obviously that; but it is said on behalf of the defendants that the pools do not amount to a competition and that no prizes are offered within the meaning of the section. I should add that para. (*b*) of sub-s. 1, of s. 26, which makes

(1) 1940 S. C. 96.
(2) [1935] Ch. 373.
(3) [1929] A. C. 400.

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unlawful the conducting in any of the specified manners of a competition " success in which does not depend to a substantial " degree upon the exercise of skill," is not in issue in these proceedings. The plaintiffs have never asserted that success in these transactions does not depend to a substantial degree upon the exercise of skill. We have nothing to do with that, because obviously such a question could only be decided on evidence and no evidence was called with regard to it. I merely mention that to make it clear that nothing that we say on this appeal has any bearing on any question that might hereafter be raised under para. (*b*). Mr. Beyfus has put his argument in a way which, I think, may without unfairness be summarized as follows. He says : The transaction into which persons enter who engage in a football pool as " investors "—that appears to be the expression used—is an operation of " pool betting." The statute deals with pool betting in part I. and regulates it in the manner there provided ; when one comes to part II., in which s. 26 appears, it is dealing with something which is quite different from pool betting ; he argues that the phrase " competition in which prizes are offered " cannot include pool betting, and, as a football pool is a form of pool betting, it therefore cannot be a competition in which prizes are offered. Putting it even more shortly, he argues that the phrase " pool " betting " and the word " competition " are mutually exclusive ; a thing which is one cannot be the other and there is no possibility of overlapping ; that is to say, you cannot have a case which falls within both descriptions. That is the scheme of his argument.

At the outset there lies the question whether or not the form of operation called a football pool is " pool betting " within the meaning of this statute. I should have thought that that is a very doubtful question. Mr. Beyfus suggested that in 1934, when this Act was passed, the legislature, in using the phrase " pool betting," must have had in mind football pools, which then existed and were widespread, and he suggested that in using the phrase " pool betting," the legislature was deliberately selecting language which referred to football pools. On looking at the Shorter Oxford Dictionary, I find under the word " pool " the phrase " pool betting," and that is defined as meaning " The collective stakes in an instance of pari-mutuel " and the year of that particular use is 1881. It is to be observed also that the phrase in the Act, " pool betting," is used always in collocation with the phrase " pari-mutuel ". It is used as an

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alternative English translation of that French expression and is not, in my view, used to cover something of a different or more extensive character than is described by the words "pari-"mutuel." "Pari-mutuel" itself is used in the Racecourse Betting Act of 1928, and, again, in the Betting and Lotteries Act, 1934, in connexion with the word "totalisator," which is used as an alternative of "pari-mutuel." In that particular context it is used to describe, not a system, but a machine or an instrument.

Those considerations—there are many more—make it seem to me to be doubtful whether "pool betting," which, as I have said, is used as an equivalent of "pari-mutuel," is a proper description of the very remarkable type of transaction which is found in a football pool. The football pool—this particular pool; and I suppose that it is typical of many—has been very closely analysed before us and I do not think that it is a misuse of language to say that it is a very peculiar and special type of operation. It seems to me to bear very little resemblance to the ordinary totalisator, the operation of which, of course, is perfectly well known and which is a method of procuring betting or enabling betting to be carried out, in such a way that the mathematically correct odds are always given. The type of transaction that we have here is very different from that. Mr. Holmes pointed out the peculiarities in the rules: the power of the promoters to apportion expenses and to apportion expenses of one week's pools among the pools of several weeks; the apportionment of one week's pools inter se; the curious results of the provision under which the money allocation is to be adjusted so as to ensure that a person in a lower category does not get more for his investment than a person in a higher category; the fact that the promoters are to pay whether the other entrants provide the money or not; and the fact that one does not know whether one has won or not until one finds out whether other people have made a more successful forecast than oneself; provided, of course, that one has not got one's forecast a hundred per cent. right. If one is anything less than a hundred per cent. right, the only way in which one can ascertain whether one is a winner or not is to wait until one is told whether somebody else has done better. All those matters seem to me to place these things in a very special category and I am certainly not prepared to accept the argument that this can properly be described as pool betting, in the context in which that phrase is used in this legislation.

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Let me assume, however, that Mr. Beyfus is right and that this is properly described as pool betting. The next stage in his argument is that, if it is pool betting, it cannot be a competition in which prizes are offered. In my opinion, that proposition does not bear inspection. In the present case there is, I think, a competitive element in a strict and narrow sense of that phrase. Mr. Beyfus said that the word "competition" in this context necessarily involves the idea of several persons pitting their skill against one another. I do not think that it is to be limited in that way, because I apprehend that if a newspaper, for instance, were to offer a prize for any successful forecast of a given future event, that would be a competition and the persons who go in for it would be properly described as competitors. If that were not so, it seems to me that the obvious scope and intention of the section could be easily defeated. But, even if a competition is to be construed as involving that necessary element of competition of the entrants inter se, that element is quite clearly present in this case. Everybody who enters wishes, of course, to achieve one hundred per cent. accuracy in his forecast; but it does not follow that anyone will achieve one hundred per cent. accuracy and, in so far as the financial reward to the investor depends on the superiority or the greater accuracy of his forecast over other forecasts, the competitive element necessarily exists. If, for instance, the result of the matches is to produce a possible total of twenty-six points and nobody gets twenty-six points, each man is competing against all the others to get the nearest to twenty-six points and, of course, the fewer entrants there are who achieve that degree of accuracy the greater is the dividend to those who do achieve it. It seems to me that, even in the narrow sense that Mr. Beyfus wishes to impress on the word "competition," the competitive element exists. That is merely one way of putting it. There are other ways that have been mentioned in argument, but I do not think it necessary to go through them.

Then it is said: Where are the prizes and who offers them? The answer to that, I should have thought, was reasonably clear. That these rewards are prizes, within any ordinary meaning of the word in this context, appears to me to be quite clear. Mr. Beyfus said that the money which a successful entrant receives is not a prize, but merely the payment of a betting debt. In my opinion, even assuming that the transaction is properly regarded as a betting transaction, the money that he receives and the money that is offered to him is properly described as a prize. Then Mr. Beyfus says: Who offers it? It does not seem to me to matter very much whether one treats the prize as offered by all the competitors or whether one treats it as offered by the promoters. The promoters are going to pay, whether the competitors pay their entrance fees or not, and even if that is regarded as a guarantee, it seems to me that the offer of that guarantee is the offer of a prize within the meaning of the sub-section. That, I think, really is all that I need say on the arguments that have been put before us.

There is, however, one matter to which I should refer and that is the effect of the proviso. Mr. Beyfus says that we ought not to look at that proviso, because the body of the section is so clear that the proviso cannot afford any assistance in its construction. Alternatively, he says that, if it is to be looked at, it points in the direction which he favours and shows, not that the word " competition " may include something which can be described as a pool betting operation, but that it quite clearly excludes pool betting operations. The use which can properly be made of a proviso is, of course, well understood. It is merely an example of the ordinary rule as to construction of documents: that you must look at the whole document and give such weight to each part of it as each part requires. It is nothing more than that. In the present case I do not think it right to ignore the proviso, because it has, in my view, a bearing on the scope of the section. The true construction of the proviso appears to me to be that it excludes from the prohibition against the conduct of competitions in connexion with a trade or business, pari-mutuel or pool betting operations carried on by a bookmaker whose only trade is that of a bookmaker. Whether that is to be relied on as showing that the legislature regarded pool betting operations as something which would clearly and necessarily be included in the meaning of the word " competition," or whether it was thought that the word " competition " was wide enough to include some things which might be described as pool betting operations, I do not know and it is not material. The materiality of it, to my mind, is that the legislature has regarded the phrases " competition in " which prizes are offered " and " pool betting operations " as not necessarily being mutually exclusive, as Mr. Beyfus argued that they were. What he said that the proviso means, if I understood him correctly, was this: that it enabled a bookmaker who was carrying on pool betting operations to carry on in addition the business of prize competitions. That is not what the language says. It does not say: Nothing in this sub-section with respect to the conducting of competitions shall apply in relation to competitions conducted in combination with pari-mutuel or pool betting operations. It does not say that, and that is what it would have to say in order to give the meaning that Mr. Beyfus wishes us to put on it. It says "Nothing in this sub-section with respect to the conducting "of competitions . . . . shall apply in relation to . . . pool "betting operations," which is a different thing altogether, and, in my opinion, it must be construed in the sense which I have indicated.

There is one more matter to which I should refer before I turn shortly to the state of the authorities; and that relates to the admissibility of certain evidence which Mr. Beyfus wished to tender. It consisted of two or more bound volumes of a periodical called *The Winner*, which contains and did contain in those days, as it contains now or contained, at any rate, until the judgment in this case, the advertisements of certain football pools. We were told that in those proposed exhibits, anterior to the Act of 1934, the same paper advertised for the same persons competitions in which prizes were clearly offered —things which really were clearly prize competitions within the narrow sense in which Mr. Beyfus interprets that phrase. Then he said: That is admissible evidence to show that the legislature, when it was using the phrases "pool betting" and "prize competitions," must have had in mind the fact that football pools and things which were admittedly prize competitions were being carried on by the same persons and advertised in the same newspaper. In my opinion, that evidence is not of the slightest value in the task of construction which we have to carry out, but is quite clearly inadmissible. Who knows whether the legislature ever employed its leisure or, indeed, its working hours, in perusal of what I imagine may be described as a rather obscure sporting periodical, and used language adapted to the state of affairs which it found in the pages of that periodical? We have no right to make any such assumption. It is not difficult for the court to assume, and I apprehend that the court can take notice of the fact, that things which were unquestionably competitions in Mr. Beyfus's narrow sense, not confined to football but extending to all manner of things, were common before 1934 and were commonly advertised or carried on through newspapers. We also know that in 1934 (and this is notorious) football pools were in existence, were well known and were popular. Those matters we are entitled to take into account; but it does not seem to me that we are entitled to take into account the practice of particular promoters in advertising in a particular newspaper two forms of operation, one of which was unquestionably a competition and one of which was unquestionably a football pool. Not only would the evidence, to my mind, be perfectly useless, but it is quite clearly inadmissible.

With regard to the authorities, reliance was, of course, placed on the original decision of Eve J. in 1935, from which both the Divisional Court and Uthwatt J. differed. I do not wish to go into the reasoning of Eve J. at any length, but my respectful criticism of his decision is that he attributes to the opinion of the House of Lords in *Att.-Gen.* v. *Luncheon & Sports Club, Ld.* (1), much too wide an effect. That judgment dealt with the relationship created by a transaction carried on between members of a club, subject to certain definite and quite clear rules, and all that the case decided was that, having regard to the circumstances of that case and in particular the language of the rules, the transaction was a betting transaction as between the members of the club who took part in the totalisator operations. Eve J. treated it as a general authority, which led necessarily to the conclusion that the football pool was a transaction of betting between the various entrants, and he regarded it as a pool betting transaction. That seems to me to be, with great respect, an unjustifiable use of the House of Lords case and not in accordance with the ratio decidendi in that case. Then he asks: If it is a competition, who are the competitors, what is the competition and where are the prizes? I do not think that I need deal with that, because it will appear from what I have already said that in my opinion there is a competition and there is a prize. The Divisional Court and Uthwatt J. both took the view which I am taking. I have no comments to make on the judgment of either of those courts, except that I agree with them, subject to one small comment on the language of Uthwatt J. He did not, in my opinion, give to the proviso to s. 26 that weight which I think it ought to bear and I cannot agree with his method of treating it. But it is right that I should say this. In the result he came to the conclusion that the substantive part of the section was to be construed in the way which he thought was

(1) [1929] A. C. 400.

the right one without reference to the proviso. I entirely agree with him. Nothing that I have said with regard to the proviso must be read as indicating that in my opinion it is necessary to have the assistance of the proviso before the body of the section can be construed in the way in which I think that it ought to be construed. I regard the proviso as being a confirmation of the construction which I find in the body of the section and it does not raise in my mind any such doubts as might very well have been raised if the proviso had meant what Mr. Beyfus said that it means. It must not be taken, therefore, that I have to fall back on the proviso in order to extract the stated meaning from the language of the section, but merely that I think that Uthwatt J. did not quite regard in the correct manner the use which ought to be made of a proviso such as this in this context.

In the result the appeal fails and must be dismissed with costs.

DU PARCQ L.J. I agree, and but for the fact that a different view was taken by Eve J., I am bound to say that I should have thought this a plain case. One does not expect, when an Act of Parliament has declared a certain thing to be illegal, to find people who are doing that thing and describing it in their own words using language to describe it which will plainly bring it within the Act of Parliament. It would have been a little surprising if the defendants in this case had described this as a competition, and said that they were offering prizes. But the question is, not what description they gave to it or what other description others might give to it, or what it would be called by those who took part in it, but whether the wide, general words used by the legislature—words, I should imagine, purposely wide and general—are such as will clearly cover it, I think that they are. The defendants come into possession of considerable sums of money, which they describe as stakes. They do not necessarily come into possession of all the stakes which should eventually be deposited with them, because there may be some defaulters, but they have, at any rate, an expectation that all the stakes will be paid. Then they say, not, indeed, that they will divide the whole of that money, or the whole of that money less some fixed percentage, in various proportions among the people who are successful, but that they will deduct from it, in addition to a fixed percentage, such sum by way of expenses as the independent accountants who supervise the matter shall consider to be right, and, as was pointed out, those expenses need not necessarily be the expenses of the particular contest, but may be other expenses of other weeks. The result is that with part of the money received, or which it is hoped will be received, the successful contestants are being rewarded, and the offer is made in plain terms that they will be so rewarded. It appears to me to be a perfectly proper and legitimate use of language to say that those making the offer are offering prizes to successful competitors.

I agree entirely with what my Lord has said as to the word "competition." It is not necessary to decide whether, in order that you may have a competition, there must be an inevitable conflict of interests between the participants in it. I agree with the view, which was, I think, indicated by my Lord, that you may have a competition, properly so-called, where there is no necessary conflict of interests, as, for instance, if the promoters say: We will give a prize, a fixed and an unvarying prize, to everybody who is completely successful. It is not necessary to decide the point to-day. I think that in such a case there is a competition properly so-called, but in the present case, as my Lord has pointed out, there is quite a distinct conflict of interests, because the fewer the competitors who are successful the more will be obtained by those who are successful, and it is to every participant's interest, not only that he should succeed, but that others should fail. As I have said, it seems to me to be plain that there was here a competition and that prizes were offered; and those are the principal matters which have been discussed.

I wish to add also that I agree that it would have been wrong to admit the evidence which was tendered, and it is an important matter of principle, in my opinion, that such evidence should not be admitted. No case was cited to us and I believe that none could be cited in which, where the court has been dealing with a modern statute, evidence has been called in order to show what facts might be supposed to have been known to the legislature when the Act was passed. It is perfectly true that in dealing with ancient statutes the court will inform itself as to such facts, usually, I think, by reference to recognized historical works or ancient documents. No such considerations apply here and there is no room for research as to the surrounding circumstances when perfectly plain language is used. Perhaps it is difficult to say of any language that it is perfectly plain, because, as experience shows, it is almost always possible to argue that there is some ambiguity in it, but in this instance we are dealing, even in the case of the French expression "pari-mutuel," with words and phrases which have found their way into English dictionaries, so that they may be supposed to be part of the English language as it exists to-day, and it has always been regarded as right that the court should, if it is necessary, inform its mind by having recourse to standard dictionaries. It matters not that this may—I say "may"—be properly described as pool betting or pari-mutuel. It is perfectly possible for a thing to be properly so described and also to be a competition for prizes. I agree with my Lord as to what is indicated by the proviso, viz., that the legislature thought that there might be cases in which pari-mutuel or pool betting operations were such that they could properly be described as competitions for prizes. For these reasons, I entirely agree that the decision of Uthwatt J., which agreed with that of the Divisional Court, was right and that this appeal should be dismissed.

MORTON L.J. I am of the same opinion, but as there has been a conflict of judicial authority on this matter I should like to express my reasons in my own words, as briefly as I may. The only question which this court has to decide is whether the five football pools advertised by the defendant company in *The Winner* for February 26, 1944, are competitions in which prizes are offered for forecasts of the result of a future event, within s. 26 of the Betting and Lotteries Act, 1934. If they are competitions of such a kind, it is not disputed that they are conducted in or through a newspaper. It would, I think, be sufficient for the plaintiff's purpose if we held that any one of those pools is such a competition, but in my judgment they all equally come within the terms of the section. I shall take the "points pool" as an example. Is the points pool a competition? In my view, it clearly is. Even if the entrants had only aimed at producing a wholly correct forecast, I think that the points pool would have been a competition; but, in addition as my Lord has pointed out, each entrant is endeavouring to secure a higher number of points than the other entrants in that particular pool, and I think that he is competing against them in any ordinary sense of that word. It would be quite useless for the entrant to send in a wholly correct forecast if all the other competitors also sent in wholly correct forecasts.

The next point is: Are prizes offered in that competition?

Counsel for the appellants has contended that the sums to be won are not prizes or, if they are prizes they are not "offered" by anyone. For my part, I cannot see why the sums received by the winners are not aptly described as prizes. Each sum so received is the reward gained by a competitor in a competition for being more successful than his rival in that competition, and such a reward surely comes within any ordinary definition of a prize. Further, in my view they are offered by the promoters of the pools. It is only necessary to look at the advertisement in *The Winner* to see that the competitors are told that success in any particular pool will be rewarded by a certain proportion of the entrance fees, less expenses and a percentage to be retained by the promoters. It seems to me that this intimation is aptly described as an offer of prizes, and none the less so because the prizes offered are not to come out of the promoters' money but out of moneys to be paid by the unsuccessful competitors. Nor does it matter, to my mind, whether or not on the true construction of the rules the promoters guarantee to the winners the full amount which they have won, notwithstanding that the losers may fail to pay up in full what they have promised to pay. It is perhaps a little dangerous to try to foretell the reactions of the man in the street (to use a common phrase) in a case of this kind, but I cannot help imagining what would happen if an entrant for one of these pools were asked, after he had sent in his entry: "Have you "entered for a competition in which prizes are offered for "forecasts of the result of football matches?" He might think that a slightly pompous question, but I do not think he would doubt that it contained a perfectly accurate description of that which he had just done.

For these reasons, I am of opinion that the points pool comes within the section, and it is unlawful to conduct it in or through a newspaper. I need not examine the other pools in detail, although they all differ in certain respects from one another. Mr. Beyfus did not attempt to argue that if any one of the pools came within the section any other of them could be outside the section. It is not for this court to consider whether football pools are or are not a benefit to the community, or to seek for a logical reason why no one may conduct them through a newspaper while anyone may conduct them through the post. The result is that this appeal must fail.

I shall deal shortly, however, with another part of the argument of Mr. Beyfus. He says that football pools are a form

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of pool betting and that pool betting is dealt with in Part I. of the Act and does not come within s. 26. For my part, I am by no means satisfied that football pools come within the term " pool betting " as that term is used in this particular statute. I do not propose to go through Part I. of the statute, but there are indications that it is dealing primarily, if not wholly, with the common form of pool betting, in which bets are laid by a number of persons on the result of a particular horse race or dog race. As Mr. Pascoe Hayward pointed out, there are certain features of these football pools which do not appear in ordinary pool betting. To take an example, suppose that A. and B. enter for the points pool and the results are six draws and six wins by home teams, so that the maximum number of points to be scored by any competitor would be twenty-four. It is quite possible, for reasons which I need not elaborate, for A. to get fewer correct results than B. and yet to get the same number of marks or even more marks. Again, it is quite possible that A. and B., entering for any of the other pools might elect to forecast the results of two entirely different sets of matches. A. might choose, for instance, the first eight matches in pool No. 1 and B. might choose the next eight. These matters seem to me to render these pools rather unlike what is ordinarily known as pool betting. However, I do not express any opinion on the point whether these football pools are " pool betting " in the sense in which that phrase is used in the Act. I am prepared to assume that they are. Even so, the essence of Mr. Beyfus's argument is that " pool betting " and "competition in which prizes are offered" are mutually exclusive. I see no reason why this should be so, and the proviso to s. 26 indicates that this argument is ill-founded. It is true that the proviso is not directed to a competition conducted through any newspaper; but, if Parliament had not thought that some at least of the operations referred to as pool betting were also competitions within s. 26, there would be no need for the proviso. If I may paraphrase the proviso, I hope accurately, it says: If a man's only trade or business is that of a bookmaker as defined in part I. of this Act, he may carry on pari-mutuel or pool betting operations, notwithstanding anything in this sub-section. That seems to me to indicate quite clearly that pari-mutuel or pool betting operations may be within the wording of s. 26, sub-s. 1.

As to the admissibility of the evidence tendered by the defendants, to which the other members of the court have

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referred, that matter was not fully argued by Mr. Beyfus, as the court was willing to take judicial notice of the fact that there were competitions of various kinds well known before the Act of 1934 was passed, some of which would come within Mr. Beyfus's definition of a competition in which prizes are offered, and some of which would not. Under those circumstances I personally have formed no conclusion on the point whether the evidence tendered by Mr. Beyfus was or was not admissible. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the company: *Jaques & Co., for North, Kirk & Co., Liverpool.*

Solicitors for the plaintiffs: *Ashby, Rogers & Fournier.*

J. W. H.

Distinguished. *Re* GEE. [1948] 1 All E.R. 498. Also [1949] 1 Ch. 284

Considered. *Re* LLEWELLYN. [1949] 1 Ch. 225

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Will—Trustee—Company formed by direction of testator—Trustee of will appointed director—Remuneration—Liability to account to trust estate.

A testator, who died in 1922, directed that, in the event (which happened) of his pre-deceasing his brother, his trustees should be bound to accept, in satisfaction of the amount due to him, at the date of his death, under a partnership contract with his brother, shares in a limited company to be formed for the purpose of acquiring the business. The company was formed in 1926. A summons was taken out by the two trustees of the will, who had been duly appointed directors of the company in 1941 and 1944 respectively, to determine whether they were liable to account to the estate for remuneration received by them from the company in respect of the office of director:—

Held, that, although the remuneration was for services as directors of the company, the opportunity to obtain that remuneration was gained as a result of a discretion vested in the trustees, and that they were liable to account to the trust estate for the sums received by them as remuneration for those services.

Williams v. *Barton* [1927] 2 Ch. 9 followed.

In re Dover Coalfield Extension, Ld. [1907] 2 Ch. 76 and *In re Lewis* (1910) 103 L. T. 495, distinguished.

ADJOURNED SUMMONS.

William Wight Macadam, who died on May 23, 1922, by his will dated September 2, 1921, directed (by cl. 14) that, in the event (which happened) of his predeceasing his brother, his trustees should be bound to accept, in satisfaction of the amount due to him at the date of his death, under a partnership contract between himself and his brother, shares in a limited company to be formed, with as little delay after his death as possible, for the purpose of acquiring the business. He further declared that his brother and his trustees should adjust all questions between them regarding the memorandum and articles of association required in the formation of the company. The provisions of the will as to the formation of the company were not carried out before the death of the testator's brother on December 10, 1924. The company was, however, formed in pursuance of an order made by Astbury J. on August 5, 1926. By art. 68 of the articles of association it was provided: "the trustee or trustees for the time being of the will of "William Wight Macadam may from time to time, until the "trusts of his will shall be determined, so long as they shall "hold shares in the company as such trustees, appoint two "persons, who may or may not already hold shares in the "company, to be directors of the company." By art. 70 it was provided that the remuneration of directors should be "such as shall from time to time be determined by the company "in general meeting." In 1931 the plaintiff Dallow was appointed a trustee of the will and in 1941 he was appointed a director of the company. On February 28, 1944, the plaintiff Dallow being then the sole trustee of the will, the second plaintiff, Leslie William Mascrop, was appointed a trustee and in May, 1944, he was appointed a director of the company. At the date of his appointment as a director the trustees had ceased to hold one-half of the ordinary shares of the company and held only nine-fortieths thereof.

The question arising whether the trustees were entitled to retain the directors' fees received by them from the company or were accountable therefor to the trust estate, a summons was taken out by them for the determination of that question by the court.

Christie K.C. and *Danckwerts* for the plaintiffs. The trustees appointed themselves directors and it was a proper appointment. Although a trustee is not entitled to make a profit out of his trust, he is entitled to retain a profit permissibly made out of a third party. That is outside his work as a trustee. This contention is supported by *In re Francis* (1); *In re Dover Coalfield Extension, Ld.* (2); *In re Lewis* (3). This is not even a case of profits, but of an opportunity to earn money. It is not a case of secret commission and there is no impropriety. [*Williams* v. *Barton* (4) and Underhill's Law Relating to Trusts and Trustees (9th ed.), p. 353, were also referred to.]

J. Neville Gray K.C. and *Timins* for beneficiaries under the will. It is a well-established principle that a trustee is not allowed to put himself in a position where his interests conflict. Trustees must not become directors of a company, when they hold shares in it for other beneficiaries under their trust. This appointment is good, but it places the trustees in a highly inexpedient position.

Albery for another beneficiary.

COHEN J. The question has been raised whether the plaintiffs are entitled to retain the directors' fees received by them from the company or whether they are accountable to the trust estate for the sums received by them as remuneration in respect of the office of director. I desire to say at once that nobody suggested any impropriety on their part in regard to this remuneration. The question was asked purely as one of law whether, having regard to all the provisions of the material documents, on general principles of law, they are accountable or not. My attention was called to a number of cases bearing on this matter, but I think that Mr. Gray and Mr. Timins were right in saying that they are all applications of the same general principle, though the consequence of applying that principle has resulted in some cases in the person concerned being allowed to retain the remuneration, and in others in his being held accountable. The principle, I think, is well stated in a passage from the speech of Lord Herschell in *Bray v. Ford* (5), which was cited by Russell J. in *Williams* v. *Barton* (6). The citation is as follows: "It is an inflexible rule of a court of equity that a person in a fiduciary position . . . . is not, unless otherwise expressly provided, entitled "to make a profit; he is not allowed to put himself in a position "where his interest and duty conflict."

The first of the cases to which my attention was called was

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(1) (1905) 92 L. T. 77.
(2) [1907] 2 Ch. 76.
(3) (1910) 103 L. T. 495.
(4) [1927] 2 Ch. 9.
(5) [1896] A. C. 44, 51.
(6) [1927] 2 Ch. 9, 11.

In re Francis (1). There the question arose whether trustees who had become directors of a company called S. W. Francis & Co., Ld., were accountable for remuneration that they had received as directors of the company. The company had been formed for the purpose of taking over the business, assets and liabilities of a revolving shutter maker which had for many years been carried on by the testator. Under the articles the testator was governing director until he resigned the office of director or died, and he had power, if he died while holding the office of governing director, to appoint any person to be governing director in his place. He did not, however, exercise that power. It was also provided by art. 80 that on his ceasing to be governing director " the company in general meeting " may, but without prejudice to art. 78, appoint any persons " to be directors of the company and may fix and determine " the maximum and minimum number of directors, and the " amount of their remuneration and qualification and a general " meeting shall forthwith be convened for the purpose . . . . " The executors or administrators of a deceased holder of " shares shall, for the purposes of this clause, be deemed to " be the holders of any shares standing in the name of the " deceased." The testator had had the whole of the preference and ordinary shares allotted to him with the exception of seven preference shares, and these were standing in his name at the date of his death on April 12, 1904 ; so that his executors were in complete control of the question of who should be appointed directors under art. 80. By his will the testator had appointed executors and bequeathed his preference and ordinary shares on the trusts in his will mentioned. At an adjourned general meeting of the company it was resolved that the applicants should be appointed, in conjunction with the respondent, directors of the company at a remuneration of 200*l*. each per annum, except during the year from the date of their appointment until the company's ordinary general meeting in January, 1905. . . . . It was admitted that the company, which had since its incorporation paid annual dividends, was earning an income on its share capital. It was decided that they were accountable, and a further question was raised, which may arise in this case also, whether the amounts for which they were accountable were capital or income of the testator's estate. In dealing with that point Kekewich J. said (2) : " The trustees hold a large number of shares which are part of

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(1) 92 L. T. 77. (2) Ibid. 78.

" the estate which is settled. The trustees hold these, which " are their qualifying shares, and are elected directors of the " company and as directors they receive a certain remuneration. " They are accountable for that to the estate, there being no " provision in the will which enables them to make a profit " for themselves, and the court not having been asked to accede " to the trustees being directors. Therefore they are account- " able. But are they to account for the amount received as " capital or income? It seems to me that prima facie it must " be capital unless you can say that it is part of the rents and " profits or, we will say, income in some way."

I do not think Mr. Christie really disputed that if I hold this case to have been rightly decided he is in a difficulty. He tried to distinguish the case by saying that the position was different because in that case they held all the shares and they, therefore, controlled effectively the remuneration, whereas in the case before me they do not hold the majority of the shares and they cannot, against the wishes of their co-shareholders, fix the remuneration. But I think that, if that case was rightly decided, it is very difficult to distinguish it, because here the trustees have, under the terms of the articles, power to appoint themselves directors and thereby acquire the opportunity of receiving the remuneration which was fixed. But, said Mr. Christie, even if that case is an authority, which I am bound to follow if there be no other authority, it is inconsistent with two decisions of Warrington J., the first of which was affirmed by the Court of Appeal. The first case is that of *In re Dover Coalfield Extension, Ld.* (1), where a Mr. Cousins, who was a director of the Dover Coalfield Extension, Ld., at the request of that company, became a director of the Consolidated Kent Collieries Corporation, Ld., in order that he might look after the interests of the Dover company. In order to qualify himself for that appointment, after he had agreed to become a director of the Kent Corporation, certain shares in the Kent Corporation, the property of the Dover company, were transferred into his name. It appears that at the board meeting (at which only he and another director, who also became a director in similar circumstances, of the Kent Corporation were present), a resolution was passed in which it was reported that they had both been elected directors of the Kent Corporation and it was resolved that their qualification shares should be transferred to them by the Dover company. Warrington J. held (and his decision was affirmed by the Court of Appeal) that the remuneration was received by Mr. Cousins for work done by him as director of the Kent Corporation and was not profit received by him for the use of the Dover company's shares in the Kent Corporation and that he was, therefore, under no liability to account for the remuneration to the liquidator of the Dover company. In that case, *In re Francis* (1) was not cited. Perhaps it is not surprising as the facts were readily distinguishable. In that case Warrington J. said: "Does a "director of one company who becomes a director of another "company, and as such is required to hold a qualification, "obtain his remuneration as a director by the use of the "shares which qualify him as director? I do not think he "does. I think it may be taken to be settled, at any rate so "far as I am concerned, by *Ex parte Beckwith* (2) that the right "to the director's remuneration does not arise from the possession of the qualification shares. A director is entitled "to his remuneration by reason of the contract of service "between him and the company for which he is acting as "director." Then later on he continues: "It is perfectly "true that he became a director in the interests of his company, "and took these shares in order to qualify him as director, "but it seems to me that he obtained his remuneration not by "the use of the shares but by acting as a director of the "corporation." Then he says later: "It seems to me, "therefore, that if I were to direct any account at all I must "direct it on the footing that Cousins was entitled to fair "remuneration for the amount of work which he did and would "be entitled to be allowed against his director's remuneration "such remuneration." Finally he said: "It seems to me, "therefore, first, that the remuneration received is not profit "which is derived by the use of qualification shares—that is to "say, that, assuming it to be profit, it is not derived by the use "of the shares; and, secondly, that it is not profit within the "principle because Cousins has given for it that which he and "the corporation have determined to be a fair quid pro quo, "and it would be impossible for the court to go behind that "and say a fair remuneration would be some other sum." It seems to me that that decision does depend on the fact that, in the view of the learned judge, first, the remuneration was remuneration for services to the Kent Corporation, and, secondly, it was a fair inference from the circumstances that the Dover company had agreed to his receiving it because they had agreed to his becoming, and requested him to become, a director of the Kent Corporation. That was, I think, clearly the view of the Court of Appeal. I do not propose to read the judgment in full: I think it will be sufficient if I read the judgment of Farwell L.J.: "The claim is that because these respondents hold their "qualification shares as trustees for the Dover company, of "which company they happen to be also directors, they are "accountable to that company for money paid for work done "and services rendered by them as directors of the Kent "company. They did the work: they are entitled to the "money. The answer to the suggestion that they could not "have earned the money unless they had been qualified to "act as directors by shares belonging to the Dover company is "that they became directors at the request of that company." It seems to me that that case was very different from the present case, where they exercised a discretion and became directors at nobody's request, so far as there is any evidence that I have seen, other than their own. I am not at all saying that I accept the view that they may not have been the most suitable persons but they were the only persons concerned in making the appointment.

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(1) [1907] 2 Ch. 76; [1908] 1 Ch. 65, 70.

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(1) 92 L. T. 77.

(2) [1898] 1 Ch. 324.

The next case on which Mr. Christie relied was the case of *In re Lewis* (1). The headnote reads: "L. was a trustee of his "father's will. His father had been one of the managing "directors of a partnership firm, and by the will L. was "nominated to be a partner in the firm in the place of his father, "but he was to hold the share in the partnership to which he "thus succeeded upon the trusts of the will. L. had, prior to "his father's death, acted as salesman of the firm at a salary. "He continued so to act after his father's death, and after his "admission as a partner, under an agreement with the other "members of the firm. The agreement to employ L. was made "bona fide and was for the interest of the firm and thus of the "trust estate. *Held*, that L. received his salary as salesman "by virtue of his agreement with the firm and not by reason "of the trusts of the will and that, consequently, he was "entitled to retain the salary in addition to certain remunera-"tion which he obtained under the will for acting as managing "partner and that he need not account for the salary to the

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(1) 103 L. T. 495, 496.

"trust estate." I think the material portion of Warrington J.'s judgment is as follows: "Now does this gentleman by receiving "this salary receive it by virtue of his position as trustee of "the estate of the testator? I am of opinion that he does not. "Does he receive it by virtue of his position as a partner? "In my opinion he does not. He receives it not by virtue of "anything done by the testator, but by reason of the agreement "which he has made with his co-partners that one of the "expenses of the firm should consist in the payment of this "salary, and in the payment of this salary to him." Then, after pointing out that there was no decided case precisely on this point, he treats the case as governed by the principle on which *In re Dover Coalfield Extension, Ld.* (1) was decided. I respectfully agree with the decision in that case. It seems to me that the distinction between that case and this is that there he secured the appointment as salesman not by virtue of the exercise of any discretion in him as trustee, but by virtue of a bargain with his co-partners; whereas in the present case the plaintiffs got their appointment, by the exercise of a power which is vested in them—not, it is true, by the testator's will, but by the articles of the company approved by the court, but none the less vested in them as trustees.

The last, and perhaps the nearest, case to the present—although it is a much stronger case than the one I have to decide—is *Williams* v. *Barton* (2) decided by Russell J., from which I have already cited a short passage. In that case the headnote says: "The defendant, one of two trustees of a will, "was employed as a clerk by a firm of stockbrokers on the terms "that his salary should consist of half the commission earned "by the firm on business introduced by him. At the recommendation of the defendant, the firm was employed to value "his testator's securities. The firm's charges were paid out of "the testator's estate and, in accordance with their contract "with the defendant, they paid to him half the fees so earned. "The defendant took no part in making the valuations or in "fixing the fees to be charged. In an action by his co-trustee "claiming that the defendant was bound to treat the fees so "paid to him as part of the testator's estate:—*Held*, that it "was the defendant's duty as a trustee to give the estate the "benefit of his unfettered advice in choosing stockbrokers to "act for the estate, but, as the recipient of half the fees earned "by the firm on business introduced by him, it was to his

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(1) [1907] 2 Ch. 76. (2) [1927] 2 Ch. 9.

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" interest to choose his firm to act. The services rendered to " the firm by the defendant remained unchanged but his " remuneration for them was increased, and increased by virtue " of his trusteeship. That increase was a profit which the " defendant would not have made but for his position as trustee " and he was therefore bound to treat it as part of the estate of " his testator." After citing the passage which I have read from the speech of Lord Herschell in *Bray* v. *Ford* (1), Russell J., continued—and I think his remarks apply to this case too— " The point is not an easy one and there is little, if any, " authority to assist in its determination . . . . it seems to me " evident that the case falls within the mischief which is sought " to be prevented by the rule. The case is clearly one where " his duty as trustee and his interest in an increased remuneration are in direct conflict. As a trustee it is his duty to give " the estate the benefit of his unfettered advice in choosing " the stockbrokers to act for the estate ; as the recipient of " half the fees to be earned by George Burnand & Co. on work " introduced by him his obvious interest is to choose or " recommend them for the job." Pausing there, it seems to me that, with a certain substitution, that last sentence applies to this case. As trustees it is the duty of the plaintiffs to give the estate the benefit of their unfettered advice in choosing the persons to act as directors of the company, as, if appointed, they will receive such remuneration as may be voted to them ; as recipients of the remuneration of directors their obvious interest is to choose themselves for the job. Then the learned judge goes on : " In the event that has happened they have " been chosen, and chosen because the defendant was a trustee, " with the result that half of what the estate pays must " necessarily pass through them to the defendant as part of " his remuneration for other services rendered, but as an " addition to the remuneration which he would otherwise have " received for those self-same services. The services rendered " remain unchanged but the remuneration for them has been " increased. He has increased his remuneration by virtue of " his trusteeship. In my opinion this increase of remuneration " is a profit made by the defendant out of and by reason of his " trusteeship, which he would not have made but for his position " as trustee." Then he goes on to deal with *In re Dover Coalfield Extension, Ld.* (2), and says : " But that case seems to me " very different. At the request of the Dover company

(1) [1896] A. C. 44. (2) [1907] 2 Ch. 76.

"Mr. Cousins had entered into a contract with the Kent "company to serve them as a director, the Kent company "paying him remuneration for his services. The necessary "qualification shares were provided by the Dover company "and in respect of those shares he became a trustee for the "Dover company. He had not, however, used his position "as a trustee for the purpose of acquiring his directorship. "He had, in fact, been appointed a director before he became a "trustee of the shares. The profit which he gained was not "procured by him by the use of his position as trustee but was a "profit earned by reason of work which he did for the Kent "company and which would not have been earned by him had "he not been willing to do the work for which it was the "remuneration. It was not (as in the present case) a profit "acquired solely by reason of his use of his position as trustee "and a profit in respect of which no extra services were "rendered."

That case is, as Mr. Christie rightly says, much stronger than the present case, because, first, the profit in a sense came directly out of the estate, and, secondly, because it was a profit earned in a sense without any work done by him. I think that the root of the matter really is: Did he acquire the position in respect of which he drew the remuneration by virtue of his position as trustee? In the present case there can be no doubt that the only way in which the plaintiffs became directors was by exercise of the powers vested in the trustees of the will under art. 68 of the articles of association of the company. The principle is one which has always been regarded as of the greatest importance in these courts, and I do not think I ought to do anything to weaken it. As I have said, although the remuneration was remuneration for services as director of the company, the opportunity to receive that remuneration was gained as a result of the exercise of a discretion vested in the trustees, and they had put themselves in a position where their interest and duty conflicted. In those circumstances, I do not think this court can allow them to make a profit out of doing so, and I do not think the liability to account for a profit can be confined to cases where the profit is derived directly from the trust estate. I leave over the matter of the exact wording of the order, because I do not want to do anything to prejudice the question whether, in the circumstances, I ought not to allow the plaintiffs to retain the whole or a part of the remuneration. If I can be satisfied (and that is the point I have not considered) that they were the best persons to be directors, I do not think it would be right for me to expect them to do the extra work for nothing.

COHEN J.
1945
MACADAM, *In re.*
DALLOW *v.* CODD.

Solicitors: *Guillaume & Sons; Chas. T. Nicholls.*

J. L. D.

In re BATES. JENKS *v.* BATES.

ROMER J.
1945
Oct. 15, 25.

Will—Annuity—" Clear of all death duties and income tax up to but not exceeding 5s. 6d. in the pound but not sur-tax "—Reliefs and allowances.

A testator by his will gave certain annuities " clear of all death " duties and income tax up to but not exceeding 5*s.* 6*d.* in the " pound but not sur-tax ":—

Held, that there was nothing in the will to justify an inference that the testator, in using the words " clear of income tax," meant " income tax at the standard rate "; that the principles of *In re Pettit* [1922] 2 Ch. 765 applied; and that the annuitants could not retain the whole proportion of the relief and allowances, referable to the annuities, to which from time to time they became entitled.

In re Tatham [1945] Ch. 34, and *In re Williams* [1945] Ch. 320, referred to.

ADJOURNED SUMMONS.

By his will dated May 28, 1944, Alfred Charles Cosher Bates gave to his wife and two other persons annuities of 1,000*l.*, 500*l.* and 400*l.* respectively " clear of all death duties and " income tax up to but not exceeding 5*s.* 6*d.* in the pound " but not sur-tax." The testator died on July 17, 1944, and the executors took out this summons to determine whether each of the annuitants was entitled to retain for her own benefit any relief or allowance by way of repayment of income tax to which she was entitled, or whether she must account for the same or any part thereof to the trustees of the will.

Jopling for the plaintiffs.

Wilfrid Hunt for the testator's widow and another annuitant. It is clear that, in imposing the qualification, the testator had in mind only the standard rate of income tax and intended that, if the standard rate exceeded 5*s.* 6*d.* in the pound the annuitants must bear that portion of the tax. He intended to confer on them a benefit under which they would be entitled to retain the relief and allowances, received by them by way of repayment of income tax, without accounting to the estate for a proportion of those reliefs and allowances received in respect of their annuities. [*In re Tatham* (1) and *In re Williams* (2) were referred to.]

Victor Coen for residuary legatees. The testator had in mind that these annuities were to be paid clear of income tax up to 5*s*. 6*d*. in the pound, with the result that they are given free of tax, unless the standard rate exceeds 5*s*. 6*d*. in the pound. If the standard rate is 5*s*. 6*d*. or less, the annuity is free of tax and the annuitant must account for all reliefs or allowances recovered. If the standard rate is 5*s*. 7*d*. or more, the estate pays so much of the tax as is referable to the rate of 5*s*. 6*d*. in the pound and the annuitant must account for a proportional amount of the relief and allowances recovered. The principles laid down in *In re Pettit* (3) apply.

W. F. Waite ; Richmount ; for other beneficiaries.

Cur. adv. vult.

Oct. 25. ROMER J. read the following judgment. The first question raised by the summons is whether, on the true construction of the will, each of the annuitants is entitled to retain for her own benefit any relief or allowances by way of repayment of income tax to which she is entitled, or whether she must account for the same or any (and, if any, what) part thereof to the trustees of the will. The question is of a kind which has not infrequently come before the courts, and the decisions relevant to it were recently reviewed by Evershed J. in *In re Tatham* (1).

The salient distinction between the present case and its predecessors is that the testator has qualified or limited the extent to which exoneration from the burden of taxation is to be enjoyed by the three annuitants. Their annuities are given " clear of all income tax up to but not exceeding 5*s*. 6*d*. " in the pound." If this limitation had not been imposed and the annuities had been bequeathed " clear of all income " tax " (without qualification), it is, I think, clear that the annuitants would have had to account to the estate for a proper proportion of the relief or allowances received by them by way of repayment of income tax, in accordance with the principles applied in *In re Pettit* (1). It is said, however, on behalf of the annuitants, that the limitation to which I have referred leads to a different result, and shows that the testator intended to confer on the annuitants a benefit under which they are and will be entitled to retain such relief and allowances for themselves, without having to account for them, or for any part thereof, to the estate. In *In re Tatham* (2), Evershed J., after referring to and commenting on *In re Pettit* (1) and the other relevant authorities, summarized the position as follows: "As I understand it, the reason underlying all these decisions "involves the result that, in formulæ of the kind here in ques"tion, there must be found, if the annuitant is to be held not "accountable in respect of reliefs and other repayments, a "limitation, by express words or necessary inference, of the "phrase 'income tax' to 'income tax at the standard rate'; "and that in the absence of express words the necessary "inference will not be lightly drawn." In a still more recent case—*In re Williams* (3)—Uthwatt J. said "that question" (of construction to be determined) "is in substance whether the "reference to income tax is a reference to the standard rate "of income tax merely as an arithmetical factor in the calcula"tion of the gross amount of the annuity given by the will, "or whether the provision as to income tax merely indemnifies "the annuitant against that part of the annuitant's income tax "(other than sur-tax) which is properly referable to the annuity. "If construed in the former sense, the actual income tax "ultimately suffered by the owner of the annuity does not "enter into the picture. Tax at the standard rate is deducted "from the gross amount resulting from the calculation and "the annuitant receives *x*l. in cash, and the income tax "referable to the gross amount has been paid for his account." In my judgment there is no sufficient indication in the present will that the testator had in mind the former of the two conceptions to which Uthwatt J. refers. It is reasonably clear that the testator intended to do no more than extend a partial indemnity to the annuitants, at the expense of his estate, against the income tax which is found ultimately to be payable in respect of their annuities. With the standard rate of income tax at 10*s*. in the pound he was unwilling that his estate should be saddled with the heavy burden that a complete indemnity would involve, and that was the reason, and in my judgment

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(1) [1945] Ch. 34.

(2) [1945] Ch. 320, 321.

(3) [1922] 2 Ch. 765.

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(1) [1922] 2 Ch. 765.
(2) [1945] Ch. 34, 43.
(3) [1945] Ch. 320, 321.

ROMER J.

1945

BATES, *In re.* JENKS *v.* BATES.

the sole reason, for the introduction of the limiting words "but not exceeding 5*s.* 6*d.* in the pound."

In my opinion there is nothing in the language of the gift itself or in any other part of the will to justify an inference that the testator, in using the words "clear of income tax," meant "income tax at the standard rate."

I am accordingly of opinion that the principle of *In re Pettit* (1) applies and that the annuitants cannot retain for themselves the whole of the proportion of the reliefs and allowances, referable to the annuities, to which from time to time they become entitled.

The question then is: how should such proportion be dealt with? The allowance to an annuitant by the Revenue of relief and repayments postulates that, in the first instance, too much tax has been paid in respect of her annuity and of her other income (if any). Of the tax so paid in respect of the annuity, and on the footing of a standard rate of income tax of 10*s.* in the pound, nine-twentieths will have been borne by the annuitant by deduction from her annuity, and eleven-twentieths will have been borne by the estate. In my judgment, any sums received from the Revenue by way of repayment of tax attributable to the annuity must go in relief of the burden in the same proportion as it was originally borne, with the result that (at the existing standard rate) nine-twentieths will belong to the annuitant and eleven-twentieths must be repaid to the estate. I can see no reason for departing from the equality of treatment that will be thus achieved, or for giving to the annuitants a higher proportion of the sums received than the proportion of the burden which they bore in the first instance.

Solicitors: *Theodore Goddard & Co.; Marcy, Russell Cook & Co.; Clifford W. Emptage.*

(1) [1922] 2 Ch. 765.

J. L. D.

COHEN J.

1945

Oct. 25, 26; Nov. 7.

In re HOBOURN AERO COMPONENTS LIMITED'S AIR RAID DISTRESS FUND. RYAN *v.* FORREST.

Charity—Voluntary collections from employees of munition factories—War emergency fund—Benefits for ex-employees serving in H.M. forces—Change to air raid distress fund—No means test applied to claimants—Destination of surplus of fund—No general charitable purpose—Trust for body of private individuals—Repayment to contributors.

During the war years from 1940 to the end of 1944 collections were made weekly from the employees of a company operating three munition factories, at first informally, and later by agreed deduction from their weekly wages, towards a war emergency fund. The moneys were for some time entirely expended on comforts or money payments for servicemen abroad or on leave, who were ex-employees or dependants of employees of the company. After September, 1940, it was decided to use the collected funds also to relieve cases of employees who had suffered damage and distress from air raids. Claims were only entertained from persons who had contributed to the fund, but no means test was imposed on any applicant. The fund having been closed, a summons was taken out for the determination of the question whether the surplus moneys were subject to a valid charitable trust, and if so that a cy-près scheme might be directed :—

Held, (*a*) that all the objects of the fund were charitable, but (*b*) there was no general charitable purpose shown, as the beneficiaries did not constitute a section of the community, but only a fluctuating body of private individuals, whose relationship to the company which employed them was purely personal. The contributors were therefore entitled to a return of a due proportion of their contributions, but must bring into hotchpot any moneys or value they had already received.

In re Drummond [1914] 2 Ch. 90, as approved by *In re Compton* [1945] Ch. 123, applied.

ADJOURNED SUMMONS.

Hobourn Aero Components, Ld., formerly called Pattison & Hobourn, Ld., manufactured aeroplane parts. Before the war their only factory was at Coventry, but during the war, under the dispersal arrangements, they took over two shadow factories one at Kettering and one at Market Harborough. When all three factories were open, the number of their employees was one thousand three hundred, of whom seven hundred were at Coventry, three hundred at Kettering, and three hundred at Market Harborough. Prior to the outbreak of the present war the employees of the company (then only some four to five hundred in number) had established a voluntary fund called the " Benevolent Fund " into which they paid one penny per week each from their wages. This fund was used to provide sickness allowances for the contributors. In addition, they made voluntary contributions, effected by deductions from wages, which were used and distributed partly in subscriptions to hospitals, so as to provide more favourable terms for such of them as might be attending the hospitals, and partly in donations to St. Dunstan's, Dr. Barnardo's and the Red Cross. All these contributions were voluntary and the company itself took no part in the administration of the funds, which were managed by a committee elected by the employees, the moneys being in the hands of some of them as trustees. By the end of the year 1939, certain of the employees had joined the forces, and some had proceeded overseas. Thereupon the employees started making weekly " hat " collections among themselves at the factory for the purpose of forming a fund from which there could be provided and sent to former employees serving in the forces parcels of food, clothing and cigarettes. The parcels were sent to former employees serving in the forces whether they had themselves contributed to the collections or not, and also out of the collections there were paid from time to time to such former employees when on leave small sums of money in the nature of leave grants. On August 27, 1940, a meeting of the Benevolent Fund committee was held at which it was decided that the old Benevolent Fund ought to be kept separate from the War Emergency Fund, and separate accounts were opened, described as (*a*) The Pattison & Hobourn Benevolent Fund, and (*b*) The Pattison & Hobourn War Emergency Fund. The latter was intended to cover soldiers' parcels, soldiers' leave grants and grants to employees who were awkwardly placed due to air raids or other damage, and it afterwards became the account of the Air Raid Distress Fund. No rules or regulations in regard to this Air Raid Distress Fund were ever made, but in November, 1940, about the time of the first big raid on Coventry, a printed form was issued to all the employees of the company, inviting them to contribute to the fund by way of deduction of wages. The first two paragraphs of the printed form read as follows : " The purpose of this Fund " is to help any employee who is in dire distress as the result of " enemy action. It does not aim at replacing all losses incurred " but to give a helping hand at a time when you most need it. " Claims made on this Fund should be made in writing, and a " claims form is to be completed . . . ." " Further, it is " suggested that the Saturday collection be discontinued, and " instead a sum of 2*d*. in the pound per week be deducted from " your wage. Are you in agreement that 2*d*. in the pound be " deducted each week for the Distress Fund for Pattison & " Hobourn, Ld. ?"

All the then employees except five signed this form. No deductions were made from the pay of the five persons who refused to sign the original form or of one new employee who objected to such deductions. With these exceptions, deductions were made in every case. Expenditure from the fund fell under two headings: first of all, payments to former employees serving in His Majesty forces, and secondly payments in respect of air raid distress. Payments to those serving in His Majesty's forces fell into two categories: first of all, a per capita payment of one pound per month which was sent to each man so serving or, if so requested by any man, invested on his behalf in National Savings Certificates, and secondly, payments to men returning on leave. Payments in respect of air raid distress were mainly grants for clothing and the like urgently required by victims of the air raids on Coventry, but some payments were made to employees at the factories whose homes in London had been damaged by enemy action, to cover their expenses in going to London to ascertain their position. The committee refused to recognize claims by any employees who did not contribute to the fund, and in considering a claim no means test was applied. The total aggregate amount expended on both classes of expenditure was 2,574*l.* 6*s.* 0*d.*, of which 2,102*l.* 17*s.* 6*d.* was expended on grants to soldiers and 471*l.* 8*s.* 6*d.* on air raid damage relief. On January 15, 1944, the committee resolved "that as from January 31, 1944, grants to ex-members serving "with the forces should be discontinued, and that the fund be "continued solely as an Air Raid Distress Fund to assist "employees or ex-employees with the forces who have suffered "the loss of their homes or contents by enemy action." Thereafter, with the exception of a few payments for expenses no payments were made out of the fund either to ex-employees serving in His Majesty's forces or for Air Raid Distress relief. In September, 1944, it was decided to stop deductions from wages and on September 7, 1944, a resolution was passed that the fund be liquidated immediately and that the proper percentage due be given back to all subscribers to the fund, and that a Sick and Benevolent Fund be started from scratch at the cessation of hostilities.

The present summons was issued by members of the committee of the fund to obtain the decision of the court as to the proper disposal of the balance of 5,886*l.*

J. G. Strangman for the plaintiffs.

Christie K.C. and *Hillaby* for the defendant Forrest. This fund, which has been formed by systematic deduction from weekly wages by agreement with the employees is a mutual insurance fund, and not the subject of any charitable trust.

There is therefore a resulting trust for the benefit of the subscribers. They are entitled to a return of the money, and the only question is whether account should be taken of any moneys expended by the committee for the benefit of certain subscribers and the amounts deducted. It was a business arrangement tempered by generosity. All proper claims made against the fund were admitted, and no question was ever raised as to the means of any claimant. In no case where there was not a clear element of poverty has such a fund as this been held subject to a charitable trust. *In re Drummond* (1). A charitable gift must be for the public benefit: *In re Hummeltenburg* (2). This is a trust for the benefit of a class of private individuals. It was a war emergency fund applied for different purposes from time to time, and the recipients of moneys always received cash. [*In re Tree* (3) and *In re Compton* (4) were also referred to.]

D. L. Oliver for a second defendant adopted the above argument.

Lindner for a third defendant referred to *In re British Red Cross Balkan Fund* (5) and *In re Welsh Hospital (Netley) Fund* (6). To create a valid charitable trust five conditions are necessary (1.) a general charitable interest, and on failure of the immediate objects, a cy-près scheme; (2.) all the purposes must be charitable; (3.) it must be a public charity; (4.) there must be a permanent fund created; (5.) there must be an out and out gift, or complete segregation of the fund. On the last point see *In re Stanford* (7) and *In re King* (8). Here all the evidence shows an absence of general charitable intention.

D. T. Chetwood for a fourth defendant, adopted these arguments.

H. O. Danckwerts for the Attorney-General. The fund was originally started to provide presents in kind and pocket money for ex-employees serving in the forces, and this object was afterwards altered to relieve distress arising from damage by air raids. These were both charitable purposes; the first comes under the heading "setting out of soldiers" in the statute of Queen Elizabeth: *Income Tax Commissioners* v. *Pemsel* (9); *In re Good* (10); *In re Donald* (11) and *In re Gray* (12).

(1) [1914] 2 Ch. 90.

(2) [1923] 1 Ch. 237.

(3) [1945] Ch. 325.

(4) [1945] Ch. 123.

(5) [1914] 2 Ch. 419.

(6) [1921] 1 Ch. 655.

(7) [1924] 1 Ch. 73.

(8) [1923] 1 Ch. 243.

(9) [1891] A. C. 531.

(10) [1905] 2 Ch. 60.

(11) [1909] 2 Ch. 410.

(12) [1925] Ch. 362.

The question remains whether there was a public charitable purpose. As this point I submit that *In re Drummond* (1) was wrongly decided on the second point. It is not consistent with more recent decisions such as *In re De Carteret* (2) : see also *In re Rayner* (3); *In re Gosling* (4) and *Royal Antediluvian Order of Buffaloes* v. *Owens* (5). *In re Compton* (6) was an entirely different case on the facts and the judgment of Lord Greene M.R. in that case cannot properly be applied to the present one.

Cur. adv. vult.

Nov. 7. COHEN J. in a written judgment, after stating the facts proceeded : The first question raised by the summons is : " whether the fund is now subject to a valid charitable trust " and if so whether in the events which have happened the fund " ought to be applied cy-près." Mr. Christie argued that the purposes of this fund were not charitable (*a*) because poverty was not a necessary qualification for participation in benefits, and (*b*) because even if the purpose was in essence charitable it was not such a purpose as the law would recognize as charitable, since it was not directed to the benefit of the community or a section of the community. It is clear that poverty was not a necessary qualification, but I agree with Mr. Danckwerts that this does not dispose of the matter and that, apart from the second point raised by Mr. Christie, the trust with which I have to deal would be a valid charitable trust. That, popularly speaking, the objects of the fund are charitable is, I think, beyond doubt. I would refer in this connexion to the observations of Lord Herschell in *Income Tax Commissioners* v. *Pemsel* (7), where he says : " I am unable to agree with the view " that the sense in which ' charities ' and ' charitable purpose ' " are popularly used is so restricted as this." That is referring to the restriction of poverty. " I certainly cannot think that " they are limited to the relief of wants occasioned by lack of " pecuniary means. Many examples may, I think, be given of " endowments for the relief of human necessities, which would " be as generally termed charities as hospitals or almshouses, " where, nevertheless, the necessities to be relieved do not " result from poverty in its limited sense of the lack of money

(1) [1914] 2 Ch. 90.
(2) [1933] Ch. 103.
(3) (1920) 122 L. T. 577.
(4) [1900] W. N. 15.
(5) [1928] 1 K. B. 446.
(6) [1945] Ch. 123.
(7) [1891] A. C. 531, 571.

COHEN J.

1945

HOBOURN AERO COMPONENTS LIMITED'S AIR RAID DISTRESS FUND, *In re.*

RYAN *v.* FORREST.

"Take, for example, an institution for saving the lives of ship-"wrecked mariners. Its object is to render assistance to those "in dire want of it, to meet a form of human need which "appeals to the benevolent feelings of mankind, but not one "which has its origin in the lack of money. Nevertheless, "I do not believe that any one would hesitate to call it a "charity, or to say that money expended in rescuing drowning "men was applied to a charitable purpose. Or again, what of a "society founded for the protection of children of tender years "from cruelty? Would not this be commonly described as "a charitable purpose? And yet it is not pecuniary destitution "that creates the necessity which such a society is designed to "relieve. It is the helplessness of those who are the objects of "its care which evokes the assistance of the benevolent. "I think, then, that the popular conception of a charitable "purpose covers the relief of any form of necessity, destitution, "or helplessness which excites the compassion or sympathy of "men, and so appeals to their benevolence for relief." The relief of air raid distress is clearly a charitable purpose within this definition, and if it were necessary for the decision of this case to decide the point, I should be inclined to hold that in relation to air raid distress relief, the law does not lag behind popular opinion.

In *In re De Carteret* (1) Maugham J. (as he then was) says: "I am, I think, justified, according to existing authorities, in "saying that objects analogous to those mentioned in the "statute"—that is the statute of Elizabeth—"are in certain "circumstances admitted to be charities, and the precise words "contained in the preamble to the statute are not final in "coming to a conclusion as to whether a particular trust is "charitable in the legal sense."

If the fund now in question had been established for the relief of air raid distress in Coventry, I do not think the court would hesitate to hold that such a purpose was of a public nature analogous to the cases mentioned in the statute and within the fourth head of Lord Macnaghten's classic definition in *Income Tax Commissioners* v. *Pemsel* (2), notwithstanding that the persons administering the fund were under no obligation to apply the means test to the recipients of bounty. Compare *In re Chaplin* (3), where Maugham J. upheld a gift for the provision of a Home of Rest notwithstanding that, as the

(1) [1933] Ch. 103, 108.

(2) [1891] A. C. 531.

(3) [1933] Ch. 115.

learned judge held, the testator's object was not merely to provide for poverty and that the objects must be justified on grounds other than the relief of poverty. So far as the presents to soldiers are concerned, assistance can, I think, be derived from authority. See *In re Good* (1). That case was, as Mr. Brunyate says in an interesting article in the Law Quarterly Review, vol. 61, p. 268, an extreme case, but it contains a useful statement of principle. The testator gave his residuary personalty upon trust for the officers' mess of his regiment, to be invested and the income to be applied in maintaining a library for the officers' mess for ever, any surplus to be expended in the purchase of plate for the mess. Farwell J., in upholding the gift, said (2). "I am not of course suggesting for a moment that the officers "are objects of charity. It is the public, not the officers, that "are benefited by better means being put at the disposal of the "officers to enable them to make themselves efficient servants "of the King for the defence of their country." So it might be argued that a fund for supplementing the pay of the army would tend to make them more efficient servants of the King, by removing complaints as to the discrepancy between the rates of pay of our army and the rates of pay of the soldiers from some of our Dominions and Allies.

I turn, therefore, to Mr. Christie's second point, the law on which is stated in Tudor on Charities, 5th ed., p. 11, in the following terms: "In the first place it may be laid down as a "universal rule that the law recognizes no purpose as charitable "unless it is of a public character. That is to say, a purpose "must, in order to be charitable, be directed to the benefit of "the community or a section of the community." This statement of the law was approved as correct by the Court of Appeal in *In re Compton* (3). The question, therefore, which I have to decide is whether or not the employees of the company who contributed to the Air Raid Distress Fund are a section of the community. I think I am bound by authority to answer this question in the negative, although it seems at first sight strange that the inhabitants of a small village or of a few ancient cottages in a manor may be the objects of a valid charitable trust, (see *In re Monk* (4) and *In re Christchurch Inclosure Act* (5), whereas a trust for the benefit of the employees of a large

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(1) [1905] 2 Ch. 60.

(2) Ibid. 67.

(3) [1945] Ch. 123, 128.

(4) [1927] 2 Ch. 197.

(5) (1888) 38 Ch. D. 520.

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1945

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RYAN *v.* FORREST.

concern is not a trust directed to the benefit of a section of a community and is therefore not a valid charitable trust. The authorities which in my view compel me so to hold are: *In re Drummond* (1) and *In re Compton* (2). In *In re Drummond* a testator by his will "bequeathed certain shares to his trustees "upon trust to pay the income therefrom to the directors of a "commercial company 'for the purposes of contribution to the "'holiday expenses of the workpeople employed in the spinning "'department of the said company in such manner as a "'majority of the directors should in their absolute discretion "'think fit,' the directors having power to 'divide the same "'equally or unequally between such workpeople'"; and the learned judge came to the conclusion that the workpeople in question could not properly be regarded as poor people, within the statute of Elizabeth; and, further, that the trust was not one for general public purposes, but a trust for private individuals, and not being charitable was void as infringing the rule against perpetuities. In the course of his judgment the learned judge said: "Then it is said, even if "that be so"—even if, that is to say, it is not a trust for the relief of poverty—"the gift may still be a good charitable gift in "that it is a gift for general public purposes, to be applied "for the benefit of a particular section of the public, and is "within the principles underlying that class of case in which a "good charitable trust has been held to be created, not for all "the inhabitants of any particular town, village or borough, "but for a particular, and very often a small, section of those "inhabitants, such, for example, as a trust for the benefit of "those possessing certain qualifications (freemen of the "borough), or residing in certain tenements, or constituting a "particular class, such as widows, or aged persons. I confess "if I could have seen my way to uphold the gift on that line of "authority I should have been pleased to do so, because, "undoubtedly, the dividing line is a very fine one. Mr. Austen-"Cartmell argues that the trust is really a trust for public "purposes, the securing of a holiday for a large body of the "inhabitants of this particular city, and the benefiting thereby "of the general health of the community; that it only differs "from the cases on which he relied in that it fixes the quali-"fication, not with reference to any particular place of residence "or to the possession of any particular franchise, but with "reference to employment in a particular business, and a

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(1) [1914] 2 Ch. 90. (2) [1945] Ch. 123.

"particular department in that business, and he contends that, "if a public trust can be created for the occupiers for the time "being of a few small cottages in a Hampshire village, a "similar trust can certainly be created for the large aggregation "of persons constituting for the time being the employees in "some of these great industrial undertakings. I think the "answer to that argument has been supplied by Mr. Clayton "in the course of his reply. This is not a trust for general "public purposes; it is a trust for private individuals, a "fluctuating body of private individuals it is true, but still "private individuals, and that being so it is outside the line of "authorities cited, and not being for public purposes it is not "charitable, but is void as infringing the rule against per-"petuities."

This decision was approved by the Court of Appeal in *In re Compton* (1). The facts in *In re Compton* have no relation to the point before me, but the Master of the Rolls, in giving the judgment of the court, laid down certain general principles. He says: "No definition of what is meant by a section of "the public has, so far as I am aware, been laid down, and I "certainly do not propose to be the first to make the attempt to "define it. In the case of many charitable gifts it is possible to "identify the individuals who are to benefit, or who at any "given moment constitute the class from which the beneficiaries "are to be selected. This circumstance does not, however, "deprive the gift of its public character. Thus, if there is a gift "to relieve the poor inhabitants of a parish the class to benefit "is readily ascertainable. But they do not enjoy the benefit, "when they receive it, by virtue of their character as "individuals but by virtue of their membership of the "specified class. In such a case the common quality which "unites the potential beneficiaries into a class is essentially "an impersonal one. It is definable by reference to what "each has in common with the others, and that is something "into which their status as individuals does not enter. Persons "claiming to belong to the class do so not because they are "A.B., C.D. and E.F., but because they are poor inhabitants "of the parish. If, in asserting their claim, it were necessary "for them to establish the fact that they were the individuals "A.B., C.D. and E.F. I cannot help thinking that on principle "the gift ought not to be held to be a charitable gift, since the "introduction into their qualification of a purely personal "element would deprive the gift of its necessary public

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(1) [1945] Ch. 123, 129.

"character. It seems to me that the same principle ought to "apply when the claimants, in order to establish their status, "have to assert and prove, not that they themselves are A.B., "C.D. and E.F., but that they stand in some specified relationship to the individuals A.B., C.D., and E.F., such as that of "children or employees. In such a case, too, a purely personal "element enters into and is an essential part of the qualification, which is defined by reference to something, i.e., "a personal relationship to individuals or an individual which is "in its essence non-public. An example of this class of case "is to be found in *In re Drummond* (1)." Then the learned Master of the Rolls states the facts in *In re Drummond* (1), reads a portion of the extract from Eve J.'s judgment which I have already read, and concludes, so far as this point is concerned with these words: "The fact that in cases where a personal "element forms an essential part of the qualification the "numbers involved may be large does not appear to me to make "any difference to the principle to be applied. Once that "element is present numbers can make no difference. The "gift is in such a case a personal gift. It may, of course, fail "for uncertainty, but that is neither here nor there. As a "personal gift it will be obnoxious to the rule against perpetuities; but it would not have been affected by the Statute "of Mortmain. I come to the conclusion, therefore, that on "principle a gift under which the beneficiaries are defined by "reference to a purely personal relationship to a named "propositus cannot on principle be a valid charitable gift."

It seems to me quite clear, from the fact that the Master of the Rolls cited and approved *In re Drummond* (1), that employment by a particular company is a "purely personal "relationship to a named propositus" within the principle as laid down by the Master of the Rolls, and, as I have already said, poverty is not a necessary qualification in the recipients of benefit from the Air Raid Distress Fund. The case does not, therefore, fall within the exceptional class of cases known as the "poor relations cases" which are explained by the Master of the Rolls in *In re Compton* (2), where he says: "There may "perhaps be some special quality in gifts for the relief of "poverty which places them in a class by themselves. It may, "for instance, be that the relief of poverty is to be regarded as "in itself so beneficial to the community that the fact that the "gift is confined to a specified family can be disregarded."

(1) [1914] 2 Ch. 90.

(2) [1945] Ch. 139.

I cannot, therefore, uphold the trust of the Air Raid Distress Fund as a valid charitable trust, having regard to the principles laid down by the Court of Appeal in *In re Compton* (1). Accordingly, I must answer the first question in the negative and declare that the fund is not now subject to a valid charitable trust.

I therefore turn to the second question raised by the summons. The Crown does not claim the fund as bona vacantia, and the question is as to how it ought to be distributed amongst the contributories thereto. The form of the question suggests that persons who had ceased to contribute before September 9, 1944, the date on which contributions ceased, might be excluded but counsel whose interest it was to support this argument admitted that there was no valid ground for any such limitation. In my opinion, he was right in making this admission, since the basis on which the contributions are returned is that each donor retained an interest in the amount of his contributions except so far as they are applied for the purposes for which they were subscribed. Moreover, the rule in *Clayton's* case (2) is not applicable in such a case (see *In re British Red Cross Balkan Fund* (3)). The question was also raised whether a subscriber who received benefit from the fund was bound to bring the amount of that benefit into hotchpot for the purposes of the distribution. My attention was called to two cases in which orders had been made for distribution of the fund without regard to such contributions. (See *In re Printers and Transferrers Amalgamated Trades Protection Society* (4) and *In re Lead Company's Workmen's Fund Society* (5).) But in both those cases the decision to this effect was based on the difficulty and the expense involved in ascertaining the amount of the respective benefits and the persons to whom they were paid. In the present case I was told by Mr. Dinham, the company's accountant, that while considerable labour would be involved, there would be no difficulty in ascertaining the amounts of the benefits or the recipients, and I have come to the conclusion that I should not be justified in deviating from the general principle, that a person seeking to participate in the distribution of a fund must bring into hotchpot anything he has already received therefrom. Accordingly, I propose to declare that the fund now available for distribution ought to be distributed

(1) [1945] Ch. 123.
(2) (1816) 1 Mer. 572.
(3) [1914] 2 Ch. 419.
(4) [1899] 2 Ch. 184.
(5) [1904] 2 Ch. 196.

COHEN J.

1945

HOBOURN AERO COMPONENTS LIMITED'S AIR RAID DISTRESS FUND, *In re.*

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amongst all the persons who during their employment by Hobourn Aero Components, Ld., contributed to the fund at any time after December 12, 1940, in proportion to the total amount contributed by them respectively to the fund, each such person bringing into hotchpot any amount received by him by way of benefit out of the fund.

Questions may arise in the working out of this order, and it may be found necessary to appoint trustees of the fund, but I see no reason for doing so at this moment. It will be sufficient to give liberty to apply. Costs of all parties of this application must be taxed as between solicitor and client and paid out of the fund.

Solicitors: *Edward & Childs; Crawley & De Reya; E. A. Kaufmann; Coldham, Birkett & Fleuret; Holman, Fenwick & Willan; Treasury Solicitor.*

H. L. L.

UTHWATT J.

1945

Nov. 19.

In re NAAMLOOZE VENNOOTSCHAP HANDELMAATSCHAPPIJ WOKAR.

Company—Winding-up—Foreign company—Registered office abroad—Place of business in England—Voluntary liquidation abroad—Petition to wind up in England—Company not on register of foreign companies—Place of business in England no longer occupied by company—Service of petition by leaving at "last known place of "business in England"—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 338—*Companies (Winding-up) Rules,* 1929 (*St. R. & O.* 1929, *No.* 618, *L*/16), *r.* 28.

A company incorporated in Holland under Dutch law had its registered office in Amsterdam, but its main business was carried on in London. The company went into voluntary liquidation in Holland under Dutch law and a creditor in England presented a petition to wind it up in England. A search of the register of foreign companies registered pursuant to s. 344 of the Companies Act, 1929, showed that the company's name was not entered therein. There were no members, officers or servants of the company at its place of business in London, but a copy of the petition was left there:—

Held, that the service of the petition, having been effected in the manner provided by r. 28 of the Companies (Winding-up) Rules, 1929, was good service.

PETITION TO WIND-UP COMPANY.

In 1922 the company was incorporated in Holland under

Dutch law. Its registered office was in Amsterdam, but its main business was carried on at offices in the City of London. On July 28, 1938, at a meeting of the shareholders held in Amsterdam, it was resolved, in accordance with Dutch law, that the company be wound up voluntarily and a voluntary liquidator was appointed. On March 19, 1940, a creditor obtained judgment against the company and, ten days later, on that creditor's application, a receiver was appointed of, inter alia, the company's rents and profits from its share in a building estate. On September 28, 1945, another creditor presented this petition to wind up the company. She was a shareholder in the company and was also a loan creditor of the company for 13,029*l.* 0*s.* 4*d.*, of which she was paid only 40*l.* in the voluntary liquidation. On October 9, 1945, an employee of the petitioning creditor's solicitors, having failed to find any member, officer or servant of the company at its office in London, left there a copy of the petition with an employee of the firm that rented the office. On October 30, 1945, the same employee searched the register of foreign companies registered pursuant to s. 344 of the Companies Act, 1929, but the company's name was not entered therein. On November 1, 1945, the same employee, having failed to find at the company's office in London any member, officer or servant of the company, left, in accordance with r. 28 of the Companies (Winding-up) Rules, 1929 (1), a copy of the petition at that office by placing it on a shelf immediately inside the entrance. On November 19, 1945, the petition came before the court.

J. G. Strangman for the petitioning creditor. The court has jurisdiction to make a winding-up order: *In re Tovarishestvo Manufactur Liudvig-Rabenek* (2) and, on the merits, ought to do so. The company itself cannot be against it, since a voluntary winding-up has long been in progress in Holland. A compulsory winding-up is the only procedure which will enable creditors in this country to have even a chance of getting any of their money at all, and only if a liquidator is appointed here will there be effective and proper application of the company's assets here. The object of the compulsory winding-up will be to ensure that the assets shall be fairly distributed among the creditors.

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(1) By s. 338, sub-s. 1, of the Companies Act, 1929: "Subject "to the provisions of this part of "this Act, any unregistered com"pany may be wound up under "the provisions of this Act, and "all the provisions of this Act with "respect to winding-up shall "apply to an unregistered com"pany . . . ."

By r. 28 of the Companies (Winding-up) Rules, 1929: "Every petition shall . . . . be "served upon the company at the "registered office . . . . of the "company, and if there is no "registered office, then at the "principal or last known principal "place of business of the com"pany, if any such can be found ". . . ."

(2) [1944] Ch. 404.

Donald Cohen for the voluntary liquidator. The company supports the petition, and is ready to waive any irregularity that there may have been in the service of it.

C. Nyholm Shawcross for the judgment creditor. The service of the petition was bad. The company's registered office, which is, in every sense, its principal place of business, is in Holland, not in England. True, it actually transacted all its business at and from its London address. That fact, however, does not make its London address its principal place of business, which is where its registered office is. Also, on the merits a winding-up order ought not to be made. If it is made, the judgment creditor will lose whatever chance he may now have of being paid.

UTHWATT J. It is contended, for the judgment creditor, first, that service of the petition was bad and, secondly, that on the merits the court ought not to make a winding-up order. As to the service of the petition, I disregard entirely the appearance of the voluntary liquidator before the court. The point is technical and I have some doubt whether it is open to the company to waive service when creditors appear and state that they are concerned with the point.

In my judgment, the service was properly effected and was therefore good. The company is a foreign company and is an "unregistered" company for the purposes of the Companies Act, 1929. Accordingly, s. 338 of that Act brings in, with regard to the method of service, r. 28 of the Companies (Winding-up) Rules, 1929. The company has not given an address for registration, as it is required to do by the Act, with the result that r. 28 is the only provision under which the petition can be served on it. Clearly the company had in this country a place of business which could properly be called its "principal place "of business," and, in my judgment, that fact determines the place at which service was to be effected. It is irrelevant that it had also a principal place of business abroad and that—if, indeed, it be the fact—that foreign place of business was, on comparison, the one to which major importance ought to be

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attached. The question is, what is the principal place of business in this country? That place is clearly the company's place of business in London. Service has been effected there in the manner prescribed by the rules and I hold, accordingly, that it was good service.

With regard to the contention that I ought not, on the merits, to make a winding-up order, the case is, in my judgment, clearly one in which I ought to do so. In Holland there has been a voluntary liquidation since 1938: in this country there are assets and there are creditors. Quite apart from the facts that those creditors have received little, and that one has obtained the appointment of a receiver in respect of his debt and the petitioner has not done so in respect of hers, there are the facts that there is a winding-up in Holland and the probability that the assets can be best dealt with and, indeed, effectively dealt with, only if an English liquidator be appointed. Those facts make it just and equitable that the company should be wound up. Accordingly, I make the usual compulsory order.

Solicitors: *Slaughter & May; Gamlen, Bowerman & Forward; Deacon & Co.*

K. R. A. H.

FOSTER WHEELER LIMITED *v.* E. GREEN & SON, LIMITED.

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Oct. 29, 30, 31; *Nov.* 19.

Lord Greene M.R., du Parcq and Morton L.JJ.

Patent—Agreement by patentee for exclusive sale of patented article to third party—Authority from Admiralty to patentee to "make, use, "exercise or vend" patented invention for service of the Crown—Effect on agreement for exclusive sale—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 29, *as amended by Patents and Designs Act,* 1942 (5 & 6 *Geo.* 6, *c.* 6), *s.* 2.

A government department is empowered by s. 29 of the Patents and Designs Act, 1907, as amended by s. 2 of the Patents and Designs Act, 1942, to "make, use, exercise or vend," subject to certain conditions, any patented invention for the service of the Crown, and in so doing they may act "by themselves, or by such "of their agents, contractors or others as may be authorized in "writing by them"; and the terms of any agreement or licence concluded between the patentee and any person other than a government department shall be inoperative so far as concerns the making, use, exercise or vending of the invention for the service of the Crown:—

Held, that the word "others" does not include the patentee

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himself, and that an authority from a government department to the patentee was no answer to a claim for an injunction by a third party to whom the patentee had agreed to sell the invention exclusively.

Decision of Evershed J. reversed.

Appeal from Evershed J.

The defendants, E. Green & Son, Ld. (in this report referred to as "Greens") were manufacturers of economizers for marine boilers, which economizers incorporated a patented device, of which Greens were the patentees. On January 24, 1939, Greens entered into an agreement with the plaintiffs, Foster Wheeler Ld. (referred to as Foster Wheeler), which contained this clause: "Greens during the continuance of this "agreement will sell and supply economizers to Foster Wheeler "for sale in accordance with the terms of the agreement and "will not knowingly sell nor grant manufacturing rights for "any economizer for use in connexion with marine boilers to "any person or corporation in Great Britain other than Foster "Wheeler except as provided by cl. 8 hereof. Foster Wheeler "shall have no right to transfer the benefit of this provision." Clause 8 was not material to the question in the present case.

During the war of 1939–1945 the Board of Admiralty, in pursuance or purported pursuance of s. 29 of the Patents and Designs Act, 1907, as amended by s. 2 of the Patents and Designs Act, 1942 (1), authorized Greens to "make, use, "exercise or vend" the patented invention for the service of the Crown, and Greens thereafter made and supplied to the Admiralty economizers for use in connexion with marine boilers.

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(1) By the Patents and Designs Act, 1907, s. 29, sub-s. 1 (as amended by the Patents and Designs Act, 1942, s. 2): "A "patent shall have to all intents "the like effect as against His "Majesty the King as it has "against a subject: Provided that "any government department "may by themselves or by such of "their agents, contractors, or "others as may be authorized in "writing by them at any time "after the application, make, use, "exercise or vend the invention "for the services of the Crown on "such terms as may, either before "or after the use thereof, be "agreed on, with the approval of "the Treasury, between the department and the patentee, or, "in default of agreement, as may "be settled in the manner hereinafter provided. And the terms of "any agreement or licence concluded between the inventor or "patentee and any person other "than a government department, "shall be inoperative so far as "concerns the making, use, "exercise or vending of the invention for the service of the "Crown."

Foster Wheeler thereupon commenced an action against Greens claiming an injunction to restrain them from making and selling economizers in breach of the clause above set out. Greens contended that on the true construction of s. 29 of the Patents and Designs Act, 1907, as amended by s. 2 of the Patents and Designs Act, 1942, the authority conferred on them by the Admiralty had the effect of making inoperative the terms of their agreement with Foster Wheeler, so far as concerned the making, use, exercise or vending of the invention for the service of the Crown. Evershed J. accepted this contention, and dismissed the action. Foster Wheeler appealed.

Valentine Holmes K.C. and *Montgomery White* for Foster Wheeler. There was no power under s. 29, sub-s. 1, for the Board of Admiralty, as a government department, to grant Greens a right to make, use, exercise or vend economizers for the service of the Crown notwithstanding the agreement of 1939, by which Greens agreed to sell all economizers to Foster Wheeler. Section 29, sub-s. 1, applies only to patented articles. The agreement was a purely commercial transaction, without reference to any patent, under which Foster Wheeler agreed to prepare the engineering design for economizers ordered and to superintend their fitment, and in return they were to receive the sole right to purchase the economizers made by Greens. Section 29 is directed only to freeing the Crown of any impediment to the use for its service of any patented invention. Here Greens were themselves the owners of any material patents, and it was Greens whom the Crown desired to employ for making and selling economizers for the service of the Crown. There was no such impediment as the Act contemplates needing to be got over by s. 29. On the other hand Greens were not bound to accept the Admiralty authority. They ought to have intimated that they were precluded by their agreement with Foster Wheeler from selling economizers to anyone else, leaving the Admiralty to deal either with Foster Wheeler or, at their option, under s. 29, with some other agent. Evershed J. was wrong in treating as applicable here *No-Nail Cases Proprietary, Ld.* v. *No-Nail Boxes, Ld.* (1), which related to a direct application of s. 29 by allowing a licensee of a patent to use the invention for the service of the Crown without payment of a royalty to the patentee. All that was done in that case was to sanction what would otherwise be an infringement of the patent.

(1) [1944] K. B. 629.

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Lloyd-Jacob K.C. and *Whitford* for Greens. Greens felt obliged to obey the order of the Admiralty, otherwise they could be deprived of their patent rights. [See the form of patent set out in the Patents Rules, 1932 (St. R. & O. 1932, No. 873) sch. III.] In these circumstances injunction is not a proper remedy. The object of s. 29 is to enable the needs of the Crown to be supplied and anyone whose rights are taken away must look to the Crown for compensation. It is erroneous to say that the 1939 agreement had nothing to do with any patent. It imposed a fetter on the user of the patents employed in making the economizers by compelling Greens to sell the economizers so produced to the plaintiffs, and to give them the general right of sale. *No-Nail Cases Proprietary, Ld.* v. *No-Nail Boxes, Ld.* (1) is directly in point. It is true that Foster Wheeler will have no right to compensation from the Crown, but they might well have a claim against Greens in respect of part of their receipts from the Crown. Whatever the terms of the Crown's authorization, any person may refer the matter to the court under sub-s. 2.

[Lord Greene M.R. This aspect of the matter does not seem to have presented itself to the rule committee. No provision is made by Or. 53A, r. 22, for an application by a third party.]

There has been such a paucity of practice under this section that it is not to be expected that every case has been covered.

Holmes K.C. in reply. It is inconceivable that if an injunction were granted the Admiralty would not return to the practice followed down to 1943 and order from Foster Wheeler. As to the suggestion that Greens might lose their patent rights, it is clear from r. 55 of the Patents Rules, 1932, that a patent need not be in the specified form, and it has never yet been suggested that a patent should be revoked on the ground of non-supply. Greens could " cause to be supplied " by supplying to Foster Wheeler for supply to the Admiralty.

Cur. adv. vult.

Nov. 19. The judgment of the Court was read by du Parcq L.J. On January 24, 1939, an agreement was entered into between Foster Wheeler and Greens, which contained this clause : " Greens during the continuance of this

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" agreement will sell and supply economizers to Foster Wheeler " for sale in accordance with the terms of the agreement and " will not knowingly sell nor grant manufacturing rights for " any economizer for use in connexion with marine boilers to " any person or corporation in Great Britain other than Foster " Wheeler except as provided by cl. 8 hereof. Foster Wheeler " shall have no right to transfer the benefit of this provision." Clause 8 of the agreement is not material to the question now before us. Foster Wheeler now appeals against a judgment of Evershed J. dismissing an action in which Foster Wheeler claimed against Greens an injunction to restrain Greens from doing what they had agreed, by the clause which we have recited, that they would not do. The ground on which the learned judge dismissed the action was that a government department, to wit, the Board of Admiralty, had authorized Greens to make, use, exercise or vend a certain patented invention (which was said to be a constituent part of the economizers in question) for the services of the Crown. Greens are themselves the patentees of the invention, and their contention, which the learned judge accepted, was that, on the true construction of s. 29 of the Patents and Designs Act, 1907, as amended by s. 2 of the Patents and Designs Act, 1942, the authority conferred on them by the Admiralty had the effect of making inoperative the terms of their agreement with Foster Wheeler so far as concerned the making, use, exercise or vending of the invention for the service of the Crown.

Shortly stated, the question for our decision is this: when s. 29 empowers a government department to act " by themselves " or by such of their agents, contractors or others as may be " authorized in writing by them " is the word " others " to be read as including the patentee? If it cannot properly be so read, it must follow that the learned judge wrongly construed this difficult section, and that the appeal must be allowed. Section 29 was recently considered by this court, and it was then held that a government department might lawfully authorize persons who were making patented articles under a licence from the patentee to make them on its behalf for the services of the Crown, on terms to be agreed between the department and the patentee or settled as provided in the section: see *No-Nail Cases Proprietary, Ld.* v. *No-Nail Boxes, Ld.* (1). The question now before us is a different one, and is bare of authority. It must be answered, like all questions of construction, by reading the words of the section as a whole, with due regard to

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the apparent purpose of the section and to the context in which the words appear. The section begins by enacting that a patent shall have to all intents the like effect as against His Majesty the King as it has against a subject. This enacting part of the section in our opinion provides the key to the interpretation of the section as a whole. The legislature is concerned with the effect which letters patent granted by the Crown are to have as against the Crown. Is the monopoly granted to the patentee to avail him as against the Crown, or only as against his fellow-subjects? Having answered that question in favour of the patentee, Parliament has proceeded, by a proviso, seriously to qualify the right which it has conferred. Any government department may do what, done by a subject, would prima facie be an infringement of the patent, namely, make, use, exercise and vend the invention. But this right is qualified in its turn. First, the department must be dealing with the invention in the permitted manner " for the services of the Crown." Secondly, the department must come to an agreement with the patentee (subject to the approval of the Treasury) as to the terms on which the invention is to be so dealt with, or, failing agreement, must abide by such terms as may be settled in the manner prescribed by sub-s. 2. Finally, not only may the government department make, use, exercise or vend the invention " by " themselves," but (to put the matter as briefly as possible) they may authorize " others " to do the like on their behalf. So far the section has dealt solely with the rights of the patentee as against the Crown. Then, having disposed of that question, it goes on to provide that the terms of any agreement or licence concluded between the inventor or patentee and any person other than a government department shall be inoperative so far as concerns the making, use, exercise or vending of the invention for the services of the Crown. The second proviso to sub-s. 1, is irrelevant to the question which we have to decide, and we need not further refer to it.

It is apparent, we think, from the foregoing summary of the material parts of the section, that it is primarily concerned with the relations between the Crown on the one hand and the patentee as such on the other. The patent is to bind the Crown, but government departments may nevertheless use the patented invention, not indeed without restraint but sub modo, and subject to the payment of proper compensation to the patentee. The government department may under the prescribed conditions itself use the invention notwithstanding the right conferred in general terms on the patentee. It may authorize "others" to do the same thing, again notwithstanding the rights of the patentee. If due regard be had to the scheme and tenour of the section it is impossible in our view to read it as enacting that a government department may effectively authorize the patentee himself to use his invention in a manner inconsistent with the rights of other parties. The concluding words of the first proviso, which affect agreements made with third persons, in substance do no more than limit the power of the patentee to confer rights on such third persons or to acquire benefits from them in return for such rights. The words follow necessarily upon the earlier part of the proviso, because the power given to government departments cannot but diminish what would otherwise be the rights of the patentee. He can only grant what is his to grant. If he purports to grant more than the proviso leaves him with the power to grant it is reasonable that his purported grant, or any agreement to grant him benefits in return for it, should be pro tanto inoperative, and this the section enacts.

On this view of the section it is not a matter for surprise that no provision is made for the award of compensation to the third persons concerned. They know, when they enter into agreements with the patentee, that there is this statutory limitation on his rights, and that a government department may at any time use its powers under s. 29. They cannot complain, therefore, if those powers are exercised with the result that their agreements are modified and their rights under them diminished. On the other hand, when it is suggested that the section must be read as empowering a government department to authorize the patentee himself to use his invention in the prescribed manner, it is a legitimate comment that, if the proposed construction were adopted, rights would be taken away from third parties without compensation. In this respect the contrast between an authority to the patentee himself, and an authority to any other person, to use the invention for the services of the Crown is obvious and striking. If the authority is given to another person the patentee cannot help himself. He must put up with the consequences and content himself with the compensation which the section provides for him. If, however, a government department is desirous of giving such an authority to the patentee, he is at liberty to refuse it. There is no power to compel him to become the agent of the government department. If he chooses to act in pursuance of the authority which the

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government department is minded to confer on him, he need not do so except on terms which are satisfactory to himself. He can have no claim to statutory compensation, and there is no need for the creation of statutory machinery to ensure that he will be dealt with fairly. In such circumstances, one would not expect to find that third persons, who found themselves deprived of the benefit of agreements with the patentee by reason of the patentee's voluntary submission to the will of the government department, would be left without compensation. The court will always lean strongly against an interpretation of a statute which deprives the subject of rights without compensation, and if there be any ambiguity in the words of the section, this consideration must lend great weight to the contention advanced on behalf of Foster Wheeler.

It was indeed submitted by counsel on behalf of Greens that the section did provide for the award of compensation to those who might be parties to an agreement or licence between themselves and the patentee, and he contended that sub-s. 2 empowered the court to deal with claims by such parties. We cannot so read it. In our opinion the words " In case of " any dispute as to the making, use, exercise or vending of an " invention under this section . . . . or the terms therefor " can only be read as referring back to the words " or in default of " agreement " in sub-s. 1. The " dispute " contemplated is a dispute between the government department and the patentee. We can find nothing in the section which can fairly be interpreted as giving jurisdiction to the court to decide any question arising between the department and any other person. The final sentence of sub-s. 2, does, it is true, refer to other persons, but only in order to ensure that payments to other persons which may enure for the benefit of the patentee shall be taken into consideration in assessing the reward which the patentee is to receive. It is to be noted that this view of the section appears to have been acted on by the rules committee ; see R. S. C. Or. 53A., r. 22.

For all these reasons we have come to the conclusion that the authority given to Greens by the Admiralty is not covered by the provisions of s. 29, and had not the effect of making inoperative any of the terms of the agreement of January 24, 1939. The learned judge who, as we have said, came to the contrary conclusion, was influenced to some extent by his interpretation of words used by this court in the judgment given in the *No-Nail* case (1). He refers to the

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(1) [1944] K. B. 629, 639, 640.

"somewhat wide" terms of the judgment, having in mind no doubt, the passage in it in which the wide scope of the word "others" is emphasized. But, although the word "others" may, in a suitable context, embrace all the world except one person, it must always be read in its context. When Parliament is regulating the rights of A and B in relation to each other, it is not to be expected that the word "others" will include either A or B, and in the present case we are of opinion, for the reasons which we have given, that the patentee is, by necessary implication, excluded from the category of persons described in the section as "agents, contractors or others."

It is unnecessary to express any opinion as to other points which were argued, or to which allusion was made, at the Bar. It was said on behalf of Foster Wheeler that Greens could have supplied the Admiralty with the specified economizers without using the patented invention. This allegation was disputed and it is unnecessary for us either to investigate its accuracy or to consider what effect the fact, if proved, would have on the rights of the parties. It was submitted for Greens that if the court came to a conclusion adverse to them, the case could be suitably dealt with by awarding damages against them, and that the injunction prayed should not be granted. In our judgment there is no sufficient reason why Greens should not be restrained from breaking their contract. The appeal is allowed with costs, and judgment must be entered for the plaintiffs for the relief claimed by para. 1 of the endorsement of the writ, with costs.

Appeal allowed.

Solicitors for Foster Wheeler: *Bristows, Cooke & Carpmael.*
Solicitors for Greens: *Darley, Cumberland & Co.*

J. W. H.

COHEN J.
1945
Oct. 30; *Nov.* 9.

In re COOPER, DECD.

BENDALL *v.* COOPER.

Will—Construction—Codicil substituting other provisions to cover eventuality of deaths of beneficiaries "during the continuance of the "war"—Period determined by final end of hostilities and surrender of enemy.

A testator who had made a will in 1937, by a codicil thereto made in 1941 directed that in the event of the death of himself, his wife

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and his two sons "during the present war" certain pecuniary legacies were to be paid, and the residue was to go to his sister-in-law, in substitution for the provisions in favour of his wife and sons contained in his will. The testator and his wife both died in 1943, but the two sons were still living:—

Held, that "during the present war" meant during the continuance of hostilities and therefore the provisions of the codicil, the object of which was to provide for the possibility of the extinction of the testator's family during the war by hostile action, did not continue in force until the treaty of peace was signed, but ceased to be operative on the effective termination of hostilities by the unconditional surrender of the enemy.

ADJOURNED SUMMONS.

The testator, Arthur Stewart Cooper, made a will in 1937 and later added two codicils thereto, and the only question raised by the summons turned on the second codicil dated October 17, 1941. By cl. 1 thereof he directed that, in the event of his death and that of his wife before she should have obtained beneficial ownership of such of his estate as was bequeathed to her absolutely by his will, or should have received the first of the quarterly payments directed to be paid to her by para. 4 (2) (*a*) of his will, or any part thereof, and provided that both deaths should occur during the present war, certain provisions should have effect in substitution for those contained in his will. Then, subject to several legacies, he devised and bequeathed all the residue of his real and personal estate unto and equally between his two sons, Alan Richard Cooper and Frank Stewart Cooper, or the survivor of them, absolutely. By cl. 2 of the codicil he directed that in the event of the deaths of both of his sons, his wife and himself "during the "present war" the following provisions should have effect in substitution for those contained in his will and thereinbefore contained. The testator then bequeathed the following pecuniary legacies, namely, to the defendant Stephanie Mary Rathbone 5,000*l.*, to the defendant Florence Jessie Fowler 3,000*l.*, to the Royal Air Force Benevolent Fund 2,000*l.*, to the defendants Florence Driver and Emily Clarke 250*l.* each, and to the plaintiff 100*l.*, and gave the whole of the residue of his estate to the defendant Ethel Flatt absolutely. The codicil continued: "Finally I declare that the provisions of this "second codicil to my will are to be operative only during the "present war and are intended to cover the eventuality of my "wife and myself or my wife myself and both sons (as the case "may be) dying during the continuance of the war and in "all other respects I confirm my said will dated June 11, 1937, "and my first codicil thereto dated February 10, 1941."

The testator died on July 22, 1943, and his wife died about an hour and a half later. The two sons both in the Royal Air Force, were still living.

On November 8, 1943, a summons was issued raising the following questions, among others: "(1.) Whether, upon the "true construction of the said will and codicils, the executors of "the testator ought (*a*) to treat the dispositions made by cl. 1 "of the second codicil as final and effectual dispositions under "which the beneficiaries therein named have now acquired "indefeasibly vested interests or (*b*) to treat the said dispositions "as liable to be displaced or superseded by virtue of cl. 2 of the "said second codicil in some and what event, and if so that the "meaning of the expression 'during the present war' may, if "necessary, be determined and directions given to the "executors."

On February 16, 1944, Simonds J. (as he then was) made an order which, so far as material, was to the following effect: "This court doth declare that upon the true construction of "the testator's will and codicils the executors ought to treat "the dispositions made by cl. 1 of the second codicil as liable "to be displaced or superseded by virtue of cl. 2 of the said "second codicil. And the question of the meaning of the "expression 'during the present war' is to stand over with "liberty to apply." From this order there was an appeal to the Court of Appeal, but, as it was thought that the matters at issue might be more readily disposed of when "the present "war," whatever that expression might mean, was ended, the appeal stood over.

Miss B. Bicknell (*A. C. Nesbitt* with her) for the plaintiff, an executor of the will.

J. Pennycuick for the testator's two sons. The meaning of the words "during the present war" is "during the con- "tinuance of hostilities." The testator's object in making this codicil was to provide against the possibility of himself and his wife and his two sons, who were in the Royal Air Force, all meeting a premature death by reason of the operation of war. He did not intend, if he and his wife should both die during the war, that his sons' rights should be held in suspense until a treaty of peace was concluded and ratified, which might not be for years after hostilities had ended. The unconditional

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surrender of both Germany and Japan has ended the war. *Kotzias* v. *Tyser* (1), *Ruffy-Arnell & Baumann Aviation Co.* v. *The King* (2) where the question of the duration of the previous war, for the purposes of a contract to train flying pupils was discussed by McCardie J.

Sir Norman Touche for legatees under the second codicil. Nations are either at war or at peace, and the law recognizes no intermediate state between peace and war. The war must be treated, at any rate in law, as continuing until concluded by a treaty of peace, duly ratified, or other state action: *Janson* v. *Driefontein Consolidated Mines Ld.* (3). After the previous war the government declared by proclamation that the war was at an end before any treaty was signed. See Termination of the Present War (Definition) Act, 1918. Orders made by government departments assume that we are still in a state of war.

Waite for Lord Riverdale, chairman of the Council of the Royal Air Force Benevolent Fund, adopted Sir N. Touche's argument. The "present war" means the war with the countries with which Britain was at war at the date of the second codicil, and that excludes Japan.

Cur. adv. vult.

Nov. 9. COHEN J. read a judgment in which, after stating the facts, he proceeded. Hostilities between this country and her Allies, on the one hand, and Germany and her Allies, including Japan, on the other, being now at an end, the summons was restored before me in order to determine the question which Simonds J. directed to stand over, namely, the meaning of the expression "during the present war." In deciding this point, I have no statutory guidance, for s. 2, sub-s. 2, of the Validation of War-time Leases Act, 1944, applies only to tenancy agreements, and there has been no legislation corresponding to the Termination of the Present War (Definition) Act, 1918. I should add that such legislation would probably not carry the matter further as under the Act of 1918 it was still necessary to look at the context of the particular instrument to see whether the date fixed by proclamation under the statute was applicable thereto.

Sir Norman Touche, on behalf of the defendants other than the sons, says that I am bound by principle to hold that "the "present war" is still continuing. His argument may be summarized as follows: the law recognizes a state of peace and

(1) [1920] 2 K. B. 69.

(2) [1922] 1 K. B. 599, 611, 613.

(3) [1902] A. C. 484, 497.

a state of war, but it knows nothing of an intermediate state, which is neither the one thing nor the other, neither peace nor war: *Janson* v. *Driefontein Consolidated Mines, Ld.* (1). This country must, therefore, be at peace or at war. It is not at peace, for the general rule of international law is that, as between civilized powers who have been at war, peace is not concluded until a treaty of peace is finally binding upon the belligerents, and that such is not reached until ratifications of the treaty of peace have been exchanged between them: *Kotzias* v. *Tyser* (2). It is admitted that no treaty of peace has been signed, much less concluded, in the present war, and accordingly " the present war " still continues. I agree that if I construed the words " the present war " in their strict legal sense I should be forced to the conclusion to which Sir Norman seeks to drive me. But the court is not bound, in construing a will, to give to each word its strict legal meaning. The principles to be applied are conveniently stated in the following passage from the speech of Viscount Simon L.C., when considering the meaning of the word " money " in the well-known case of *Perrin* v. *Morgan* (3): " Notwithstanding this long tradition " I would urge the House to reject the view that, in construing " a will, the court must start with a presumption in favour of a " particular narrower meaning of the word ' money ' (though " not, indeed, its narrowest meaning), and that, in the absence " of contradictory context, the court is bound to apply this " narrower meaning, even though the inference is that this " is not what the testator really meant by the term. As I have " already said, the word ' money ' has more than one meaning, " and it is, in my opinion, a mistake to pick out one interpretation of the word and to call it the ' legal ' meaning or " the ' strict legal ' meaning as though it had some superior " right to prevail over another equally usual and not illegitimate meaning. The context in which the word is used is, " of course, a main guide to its interpretation, but it is one thing " to say that the word must be treated as having one particular " meaning unless the context overrules that interpretation in " favour of another and another thing to say that ' money,' " since it is a word of several possible meanings, must be construed in a will in accordance with what appears to be its " meaning in that document without any presumption that it " bears one meaning rather than another." Those observations

(1) [1902] A. C. 484, 497.
(2) [1920] 2 K. B. 69, 77.
(3) [1943] A. C. 399, 412.

in my view, apply to the words "the present war" in Mr. Cooper's will. When a person refers to "the end of the "present war," he may mean the date on which, in accordance with strict legal principles, the war is brought to an end by ratification of a Treaty of peace, but the ordinary man would be much more likely to have in mind the effective end of hostilities.

I am, of course, not dealing with words used in casual conversation, but with words in a will which appears to have been drafted under competent legal advice. None the less, having regard to the objects of the provisions under consideration and to the actual circumstances, I think that the testator had in mind not the conclusion of a treaty of peace but the effective end of hostilities between the United Kingdom and her Allies, on the one hand, and Germany and her Allies on the other. What was the object of cl. 2 of the second codicil? Plainly, as I read the codicil, to provide for the possibility of the extinction of the testator's family by enemy action, and to give directions as to the distribution of his property if that event occurred. This seems to me to be plain from the concluding words of cl. 2, where the testator says: "Finally, I declare that "the provisions of this second codicil to my will are to be "operative only during the present war and are intended to "cover the eventuality of my wife and myself or my wife "myself and both sons (as the case may be) dying during the "continuance of the war." The risk of this event occurring ceases with the end of hostilities, not, of course, by mere armistice, but by final and unconditional surrender. It seems to me equally plain that the testator desired his sons to become absolute masters of his residue when the risk of their extinction by enemy action ceased. The last thing he intended was that on their return to civil life their enjoyment of the property should be indefinitely postponed. Yet it is clear that this may well happen if I attribute to the words "during the present "war" their strict legal meaning. But it may be said that the testator would not necessarily have realized this possibility when he made his will. It is true that in October, 1941, the United States of America and Japan were still neutral, but the war had already reached such dimensions and was raging over so vast an area that I think the possibility of prolonged negotiations after the permanent conclusion of hostilities before a peace treaty could be ratified must have been present to the mind of any reasonable man.

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On the whole I think, applying the principle laid down by Viscount Simon, that I must come to the conclusion that "during the present war" in this will means during the continuance of hostilities, and that the present war had come to an end with the effective end of hostilities. Some argument was addressed to me on the question of whether "the present war" meant only the war with Germany and such other powers as were enemies of the United Kingdom at the date of the testator's will, or whether it embraced the war with Japan. Having reached the conclusion that the material factor is the effective end of hostilities, I am spared a decision on this further point, since there can, to my mind, be no doubt that unconditional surrender, unlike an armistice, puts a final end to hostilities, and both Germany and Japan have signed documents of unconditional surrender. Accordingly, I propose to declare that the residuary estate is now divisible between the first two respondents to this summons.

Solicitors: *Preston, Lane, Claypon & O'Kelly for Evershed & Tomkinson, Birmingham; Charles Russell & Co.*

H. L. L.

TRUSSED STEEL CONCRETE COMPANY LIMITED *v.* GREEN.

COHEN J.

1945

Dec. 7.

Emergency legislation—Master and servant—Company—Managing director—Dismissal—" Scheduled undertaking "—" Persons employed by the undertaking "—" At and from " addresses stated in schedule—Permission of National Service Officer—Defence (General) Regulations, 1939 *(St. R. & O.* 1939, *No.* 927), *reg.* 58*A*, *sub-cl.* 4*A—Essential Work (General Provisions) (No.* 2) *Order,* 1942 *(St. R. & O.,* 1942, *No.* 1594), *paras.* 2 (1) (4), (3)*—Certificate of scheduled undertaking.*

The managing director of a company appointed in 1936 for a term of seven years, extended in 1943 to cover the duration of the war, was dismissed in 1945 by a resolution of the board of directors. In 1944 the Minister of Labour and National Service certified that the company was carrying on a scheduled undertaking at various addresses where its head office and works were situate, and therefore the company became subject to the Essential Work (General Provisions), (No. 2), Order, 1942, as regards the persons specified in the certificate, all being persons employed by the company at and from certain addresses, with certain exceptions. The managing director claimed that as one of those persons he could not be dismissed without the consent of the Minister, which had not been obtained. The company then moved to restrain him from continuing to act as, or representing himself to be the managing director :—

Held, that while the defendant might be a person "employed" by the company, he was not, as managing director, employed "at" or "from" any particular address, and therefore he did not come within the terms of the order, and could be dismissed without the consent of the Minister.

MOTION.

The defendant Green was a director of the plaintiff company and by an agreement dated March 25, 1936, was appointed managing director for a period of seven years to January 1, 1943. By cl. 3 of the agreement it was provided : "During the continuance of this agreement Mr. Green shall "devote his whole time and attention to his duties as managing "director and shall in all respects conform to and comply "with the directions given and regulations made by the "board of the company and shall do all in his power to promote "develop and extend the business of the company and shall "not without the consent of the company during such con-"tinuance directly or indirectly engage or be concerned or "interested in any other business of any kind whatsoever." Clause 4 fixed his remuneration at 2,000*l.* per annum, and provided also that nothing in the agreement should disqualify him from participating in directors' fees. By cl. 6 his employment might be determined forthwith by the company by notice in writing.

On January 28, 1943, a supplemental agreement was entered into extending the period of service for the duration of the war unless and until determined by either party giving six months notice in writing to the other, to expire on the last day of any month. On March 14, 1944, the Minister of Labour and National Service certified the undertaking of the plaintiff company as a scheduled undertaking under the Essential Work (General Provisions) (No. 2) Order, 1942, in respect of the persons specified in the certificate being persons employed by the undertaking named at and from the addresses named therein excluding site construction, that is to say, carpenters, steel fixers, concreters and general labourers. In November, 1945, the board became anxious as to their administrative arrangements, and an advisory committee was formed consisting of the chairman of the company, Sir Duncan Watson, the defendant Mr. Green and two other directors. The defendant was invited to make a written report for consideration by all the directors, and did so. A board meeting was held on November 13, 1945, and the defendant was present at the beginning but withdrew during the part of the meeting at which it was proposed to discuss his retention as managing director. The meeting was adjourned until the next day and, although the defendant was aware that it was being held and he was actually in the building, he never attended. All the other directors were present and, after a full discussion, it was decided to remove the defendant from the office of managing director. The defendant said that he was never summoned to that meeting, but no suggestion was made, that apart from the question of the Essential Works Order, the directors did not act within their rights. As a result, on November 14, the chairman wrote advising him of the resolution and enclosing a cheque for 694*l*. 8*s*. in respect of his salary calculated up to May 31, 1946, in lieu of notice. It was common ground that if the directors had a right to dismiss him the payment in lieu of notice was sufficient. The defendant disputed the right of the company to dismiss him and made quite clear his intention, unless restrained, to resume the functions of managing director.

The plaintiffs now moved for an order restraining the defendant from acting or purporting to act as managing director of the company, or holding himself out as managing director.

As the matter affected the powers of the Minister of Labour notice was given to the Crown, and the Minister was represented by counsel as amicus curiæ.

Raymond Jennings K.C. and *Milner Holland* for the plaintiffs. It is not difficult to draw the line between an employer and a person employed, and a managing director on the employing side of the line. It may not be possible to give any answer to the abstract question—Was Mr. Green "employed" as managing director? But see Articles 87 to 90 of the Articles of Association. A managing director exercises such powers and gives such directions as the Board think fit, he is an ordinary director entrusted with special powers and duties. A manager is in quite a different position and a servant of the company. They referred to *In re Newspaper Proprietary Syndicate, Ld.* (1), *Normandy* v. *Ind, Coope & Co., Ld.* (2),

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(1) [1900] 2 Ch. 349.

(2) [1908] 1 Ch. 84, 104.

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TRUSSED STEEL CONCRETE CO., LD. *v.* GREEN.

In re Beeton & Co., Ld. (1), *Cummins* v. *Holloway Bros. (London), Ld.* (2), *National Association of Local Government Officers* v. *Bolton Corporation* (3) *In re Lee, Behrens & Co. Ld.* (4), *Sputz* v. *Broadway Engineering Co., Ld.* (5).

Aiken Watson for the defendant. The Minister of Labour has power to include the managing director of a company among the "specified persons" employed by the company within the Essential Work Order, and it is submitted that he has done so here, and therefore the defendant is still managing director. The order covers all persons employed by the undertaking at and from certain addresses. The defendant must be regarded as employed either "at" or "from the head "office of the company." *Fowler* v. *Commercial Timber Co., Ld.* (6), *Southern Foundries (1926), Ld.* v. *Shirlaw* (7).

Arthian Davies for the Minister of Labour referred to *Anderson* v. *James Sutherland (Peterhead), Ld.* (8) and *William Dixon, Ld.* v. *Patterson* (9).

Jennings K.C. in reply referred to *George* v. *Mitchell King, Ld.* (10).

COHEN J. stated the facts and proceeded: The powers of the Minister of Labour are derived in the first instance from Defence Regulation 58 (A), paragraph 4 (A) of which provides: "The Minister may by order make provision for "securing that enough workers are available in undertakings "engaged in essential work and may in particular provide by "any such order—(*a*) for securing that, except in circum-"stances and to the extent provided by the order, persons "employed in any such undertaking shall continue to be "employed in that undertaking, and shall not be caused to "give their services in any other undertaking." After various provisions which I need not read in detail dealing with absence without reasonable cause and so on, para. 4 (A) ends, "and "any such provision may be made so as to relate either "generally to undertakings engaged as aforesaid or to any "particular undertaking or class or description of under-"takings so engaged, and either generally to persons employed "in undertakings to which the order relates or to any particular "person or class or description of persons so employed."

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(1) [1913] 2 Ch. 279, 285.
(2) [1944] K. B. 323.
(3) [1943] A. C. 166.
(4) [1932] 2 Ch. 46.
(5) (1944) 171 L. T. 50, 51.
(6) [1930] 2 K. B. 1, 6.
(7) [1940] A. C. 701.
(8) 1941 S. C. 203, 210.
(9) 1943 S. C. (J.) 78, 86, 90.
(10) (1943) 59 T. L. R. 153.

The words to be noted particularly are the introductory words, "for securing that enough workers are available" for an undertaking. Mr. Jennings suggests that the term "workers" cannot reasonably include a managing director. Pursuant to the power conferred by that section the Minister, on August 6, 1942, made the Essential Work (General Provisions) (No. 2) Order, 1942. Paragraph 2 of that order provided: "(1.) Subject to the provisions of this Order, if "the Minister is satisfied that:—(*a*) an undertaking is engaged "in essential work; and (*b*) it is expedient for securing the "defence of the realm or the efficient prosecution of the war "or for maintaining supplies or services essential to the life "of the community so to do; he may enter the name of the "undertaking in a Schedule of Undertakings to be kept by "him as respects any persons employed in the undertaking "or any class or description of such persons (hereinafter in "this Order referred to as 'specified persons'), and shall "serve upon the person carrying on the undertaking a certifi-"cate that the undertaking is a scheduled undertaking in "respect of the specified persons." Sub-clause 4 provided: "There shall not be included among the specified persons "employed in a scheduled undertaking any persons of the "following class or description unless those persons are "particularly included as regards that undertaking, that is "to say:—persons whose employment in the opinion of the "Minister ordinarily involves not more than thirty hours' "service weekly where the employment began on or after "3rd September, 1939," and the services rendered are of a certain character therein specified. Then para. 3 contains provisions as to entering undertakings in the Schedule of Undertakings. Among other things which the Minister has to do is to satisfy himself "that the "terms and conditions of employment of persons employed "in the undertaking are not less favourable than the "recognized terms and conditions as provided for by "the Conditions of Employment and National Arbitration "Order, 1940." That order set up the National Arbitration Tribunal and the terms thereof are primarily suited and relevant more to the discussion of what I may call the class of workers who are members of the trade unions—not necessarily manual workers but trade union members—and prima facie is not very apt in its terms in relation to the position of a managing director.

It is to be observed that "workman" is given a very wide meaning in the definition section of that order. It means: "any person who has entered into or works under a contract "with an employer, whether the contract be by way of manual "labour, clerical work or otherwise, be expressed or implied, "oral or in writing and whether it be a contract of service or "of apprenticeship or a contract personally to execute any "work or labour." Then cl. 4 contains various provisions as to employment in scheduled undertakings, which I think it is fair to say on the whole are more applicable again to weekly wage earners than to a person in the position of a managing director.

That being a short statement of the relevant provisions of the order, the question I have to consider is not whether a managing director should be dismissed, but whether a managing director serving under a contract such as that by which Mr. Green is bound is a person employed in the undertaking within the meaning of the Essential Work (General Provisions) (No. 2) Order, 1942. My attention has been called to a number of cases in which in certain contexts managing directors have been held not to be in the one case servants and in another case in the employment of a company. But I think Lord Carmont in delivering his judgment in *Anderson* v. *James Sutherland* (*Peterhead*) *Ld.* (1), was right when he said: "Each of the decisions was given in cases where the "context played a vital part in the conclusions arrived at." It has been held that a managing director is not a servant within the meaning of the preferential payment clauses in the Companies Act, 1929. It has been held that he is not a person in the employment of the company where the question under consideration was the power of the company to pay pensions to persons in the employment of the firm. The widest statement of the principle was that by Eve J., in *In re Lee, Behrens & Co., Ld.* (2), where he said: "'a director is not a servant' of "the company; per Lord Justice Bowen in *Hutton* v. *West* "*Cork Ry. Co.* (3), nor is any managing or other director "a person in the employment of the company: *Normandy* v. "*Ind, Coope & Co., Ld.* (4)."

Those were decisions on the facts, and I have to consider the question whether Mr. Green is in the employment of this company having regard to terms of the Essential Work

(1) 1941 S. C. 203, 212.
(2) [1932] 2 Ch. 46.
(3) (1883) 23 Ch. D. 654.
(4) [1908] 1 Ch. 84.

(General Provisions) Order, 1942. The object of that order was the efficient prosecution of the war. The order was made under reg. 58 (A), sub-cl. 4 (A) of the Defence (General) Regulations in order to secure that enough workers were available for different undertakings, and it seems to me right to take the view that the term " workers " is there used in the widest sense. Why are not managing directors or general managers as necessary as other persons? It seems to me that if you treat it as limited to one class of worker you may immediately give rise to labour troubles and the like. You have the express provision in this reg. 58(A) that you can specify any particular person or class of persons. I am inclined to the view that I am not justified in construing the word " workers " in sub-cl. 4 (A) as so restricted as not to include persons in the position in which Mr. Green was employed. But I do not think that that necessarily involves that every managing director would necessarily come within the description. I think you have to consider it in each case according to the facts of the case. When I find a man who is bound to devote his whole time to the affairs of the company, to do all in his power to develop and extend the business of the company, not to engage in any other business and who is engaged on the terms that his employment may be determined by the company by notice in writing, I find it impossible to say that he is not employed by the company.

I think the right way of stating the conclusion I have reached is that there is nothing to prevent me giving to the words " persons employed in the undertaking " in cl. 2 of the Essential Work (General Provisions) (No. 2) Order, 1942, a wide meaning, and that the Minister has power under reg. 58(A) to make an order affecting persons in the category of Mr. Green. I cannot see any reason for limiting his power any more than the Court of Sessions did in the case to which I have referred of *Anderson* v. *James Sutherland* (*Peterhead*), *Ld.* (1). In that case what the Court of Sessions had to decide was whether a managing director was within the meaning of an article " a member of the company who is employed by the " company in any capacity," and they came to the conclusion that he was such a person. I do not see any reason to imply any limitation on the words " any person employed in the " undertaking " by excluding from that definition persons employed in the capacity in which Mr. Green was employed

(1) 1941 S. C. 203.

under the terms of this agreement. On the other hand, I must say that obvious disadvantages and unfairness may be involved in certifying managing directors. Directors are really the representatives of the shareholders. Shareholders exercise really the only effective control they can exercise by appointing directors, and the effect of scheduling a managing director would be to deprive the shareholders of that control over their own representatives since if a managing director cannot be discharged, presumably he cannot be removed from the office of director. While, therefore, I think the Minister has power to make an order covering Mr. Green, I think I must carefully scrutinize the order he made to see whether he has thought it necessary to exercise that power.

The question, therefore, is whether in the order scheduling the undertaking of the plaintiff company the words "all "persons employed by the undertaking" include Mr. Green. It is to be observed that the persons are, so to speak, identified by a locality. They have to be employed "at and from the "above addresses." If the words were "at the above "addresses," I think the case would be governed by authority. In *Sputz* v. *Broadway Engineering Co., Ld.* (1), a resolution had been passed pursuant to the articles of a company removing from office as directors of the company five persons, one of whom, the plaintiff, was managing director. The headnote is as follows: "The plaintiff sought an injunction restraining "the company from removing him from his office as managing "director on the ground that the company was precluded "from determining his employment by the Essential Work "(General Provisions) (No. 2) Order, 1942. At the date when "the resolution was passed the company owned two works, "one at S. and another at D. The Minister had made orders "in respect of both works, so that they became under art. 2 "of the order of 1942, scheduled undertakings. The order "made in respect of the S. works was expressed to apply "to 'all persons employed in the above-named company's "'works at S.' The second order in respect of the D. works "was expressed to apply 'to all persons employed at the "'above address by the undertaking.' Held, that a person "in the position of the plaintiff, being the sole managing "director of a company, was not a person 'employed at the "'above address by the undertaking named.' He was not "employed at any address. He was not within the scope of "the order and his case for an injunction failed." Uthwatt J.'s

(1) 171 L. T. 50, 51.

judgment is at page 51 and, so far as relevant, it is in these terms: "This gentleman's claim is based upon the fact that "he is the managing director. Whatever meaning you give "to 'persons employed,' whether it is going to include persons "on the management side as well as persons on the works "side, I am clear that when you get a man in the position "of managing director of a company, and its sole managing "director, you cannot predicate of him that he is a person "'employed at the above address by the undertaking named.' "He is not employed at any address. The whole order is "directed to describe persons, the conditions of whose "employment require that they should carry out their work "at a particular place and who do in fact carry out that "requirement. Locality is an essential part of the description "contained in the order made by the Minister." It seems to me that that statement of principle applies to the case before me and that I could not decide in Mr. Green's favour without ignoring the statement of principle on which Uthwatt J.'s decision is founded.

Mr. Aiken Watson very naturally tried to distinguish the case (*a*) on the fact of the inclusion of the registered office amongst the works mentioned, and (*b*) on the inclusion of the words "and from." So far as the latter are concerned, I think they are probably directed to such cases as commercial travellers, who do most of their work out but return to those places from time to time and are connected with the others. Be that as it may, I think if I hold, as indeed I am bound to hold, that the managing director is a person whose employment is not, in the absence of some express agreement, at any particular place, he is equally not employed from any place and, therefore, is not within the ambit of this order—to quote Uthwatt J., "The whole order is directed to describing "persons, the conditions of whose employment require that "they should carry out their work at a particular place"— I would add "or be connected with a particular place"— "and who do in fact carry out that requirement." On the whole, therefore, I have come to the conclusion that the plaintiff company is entitled to the injunction they ask. The matter is one of considerable importance and costs will be costs in the action.

Solicitors: *Braby & Waller; Denton, Hall & Burgin; Treasury Solicitor.*

H. L. L.

COHEN J.

1945

Nov. 27; Dec. 6, 11.

In re PRINGLE. BAKER *v.* MATHESON.

Administration—Survivorship—Simultaneous death—Air raid—Two persons killed by same bomb—Meaning of "simultaneous."

A testatrix by her will made in January, 1939, gave all her property to her sister X. By a codicil made in January, 1941, she provided: "In the event of the simultaneous death of [X] "and myself I hereby . . . . bequeath the interests of my monies "to be divided between my two sisters [Y] and [Z]. After the "deaths of these two named the capital to go to my "nephew [A]." On February 7, 1943, the testatrix and her two sisters X and Z were killed in an air raid by the same bomb:—

Held, that, having regard to the date of the codicil, the testatrix was clearly contemplating the event which happened; that she meant by the phrase "simultaneous death" not death in such circumstances that a metaphysician would hold that death at the same moment of time had been proved, but death in such circumstances that the ordinary man would infer that death was simultaneous; and that the provisions of the codicil therefore took effect.

Hickman v. *Peacey* [1945] A. C. 304, applied.

Held, further, that the testatrix intended to give to her two sisters Y and Z a life interest only: that, during the lifetime of the sister Y, that half of the income of the estate of the testatrix which, under the codicil, was payable to the sister Z was payable to the sister Y, and that it was only after the death of the survivor of the two sisters Y and Z that the testatrix intended to dispose of the whole of the capital.

In re Ragdale [1934] Ch. 352 followed.

ADJOURNED SUMMONS.

By her will dated January 6, 1939, Anna Elizabeth Pringle gave "the whole of my property of every kind to my sister "Christina Jane Pringle." By a codicil dated January 21, 1941, the testatrix directed as follows: "In the event of the "simultaneous death of the aforesaid Christina Jane Pringle "and myself I hereby . . . . bequeath the interests of my "monies to be divided between my two sisters Mary Agnes "Matheson and Emily Gertrude Pringle. After the deaths "of these two named the capital to go to my nephew Robert "William Elder." The testatrix, Christina Jane Pringle and Emily Gertrude Pringle were killed in an air raid by the same bomb on February 7, 1943.

A summons was taken out by the executrix of the estate of the testatrix to determine whether in the event (which happened) of the death at approximately the same time of the testatrix and Christina Jane Pringle, the disposition of the estate of the testatrix contained in the will was revoked by the codicil, wholly or to what extent : and, in the event of that question being answered in the affirmative, and in the event (which happened), of the death of Emily Gertrude Pringle at approximately the same time as that of the testatrix, whether the half-share in the income of the estate of the testatrix which, by the codicil, was made payable to Emily Gertrude Pringle was, during the remainder of the life of Mary Agnes Matheson, payable to the nephew Robert William Elder, or was undisposed of, or was disposed of by the will, or was payable to Mary Agnes Matheson, or was payable to the personal representatives of Emily Gertrude Pringle.

Humphrey H. King for the plaintiff.

J. V. Nesbitt for a beneficiary claiming under the codicil. This codicil has provided for the event which the testatrix feared might happen. It is important to notice the dates. The will was made some months before the outbreak of war, whereas the codicil was made in 1941, when bombs had already been dropped during a period of several months. The testatrix and her sister, Christina, having been killed by the same bomb, must be presumed to have died simultaneously.

Shebbeare for another beneficiary claiming under the codicil. All the propositions bearing on this point are to be found in *Hickman* v. *Peacey* (1). He also referred to *Perrin* v. *Morgan* (2).

M. O. Stranders for a beneficiary claiming under the will. The codicil has no effect. Unless there is something in law preventing it, the word " simultaneous " has a meaning, namely, " at the same moment of time." The word has no application, unless it is proved to have a meaning, and, in that case, the provisions of s. 184 of the Law of Property Act, 1925 (3) apply. This is not a case of simultaneous death. Section 184 of the statute therefore applies and the provision

(1) [1945] A. C. 304.

(2) [1943] A. C. 399, 420.

(3) Law of Property Act, 1925, s. 184 : " In all cases where, after " the commencement of this Act, " two or more persons have died " in circumstances rendering it " uncertain which of them sur" vived the other or others, such " deaths shall (subject to any " order of the court), for all " purposes affecting the title to " property, be presumed to have " occurred in order of seniority, " and accordingly the younger " shall be deemed to have sur" vived the elder."

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contained in the will prevails. He referred to *In re Lindop* (1); *In re Grosvenor* (2).

Denys B. Buckley, for another beneficiary, claiming under the will. The codicil is void for uncertainty. The onus of satisfying the court as to the validity of the codicil rests on those who claim under it. Having regard to the extreme difficulty of establishing simultaneous death, the legislature has thought fit to make special provision by s. 184 of the Law of Property Act, 1925, to meet a contingency of this kind. That section applies to the present case, which is not distinguishable from *Hickman* v. *Peacey* (3).

Mrs. Susan Mildred Elder another beneficiary in person.

Cur. adv. vult.

Dec. 6. COHEN J., reading a judgment, said: The first point to be noted is that I am not, on this question, primarily concerned with the meaning of s. 184 of the Law of Property Act, 1925. Its meaning was considered by the House of Lords in *Hickman* v. *Peacey* (3) where it was held, on facts very similar to those of the present case, that the presumption prescribed by the section applied. The basis of the decision of the majority in the House of Lords was that the question to be answered, in deciding whether the section applied, was not whether there was simultaneous death, but whether there was uncertainty as to which of two or more persons survived the other or others. It appears clearly from the speeches of Lords Macmillan and Porter that their Lordships' view was that the existence of a reasonable element of doubt was enough to create uncertainty, although a jury on the evidence might be able to arrive at a conclusion. Lord Macmillan said (4): "It " is easy to involve oneself in logical and metaphysical subtleties, " and perhaps fallacies, in handling such a topic as this. It " is true that time is infinitely divisible and also that it " is theoretically possible that the deaths of two persons may " be absolutely coincident in time. 'This is, of course, " 'a profound and impressive truth,' as Lord President " Robertson once said in another context, and then proceeded " to add 'but there are times and places for everything, and " 'I should hardly have thought a Tramway Act exactly

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(1) [1942] Ch. 377, 382.

(2) [1944] Ch. 138.

(3) [1945] A. C. 304.

(4) Ibid. 323,

" ' the occasion which Parliament would choose for teaching " ' business men metaphysics unawares ' : *Edinburgh Steam* " *Tramways Co.* v. *Edinburgh Magistrates* (1). I prefer, " therefore, to judge the language of the present enactment " by a more commonplace standard. I think that it poses " a practical question—Can you say for certain which of " these two dead persons died first ? If you cannot say for " certain, then you must presume the older to have died " first. It is immaterial that the reason for your inability " to say for certain which died first is either because you " think they both died simultaneously or because you think " they died consecutively but you do not know in what " sequence. I note with interest that the learned Master " of the Rolls himself, in the course of the argument in the " Court of Appeal ' suggested that the section on its true " ' construction might cover the case of simultaneous " ' deaths ' (2). The reasons which he gives for rejecting " his suggestion do not, with all respect, convince me, despite " their verbal logical cogency. I would only add a few words " regarding the term ' uncertain ' which occurs in the enact" ment and which was so much canvassed in the course of " the argument. The basis of belief may range from mere " conjecture through all degrees of probability to absolute " demonstration—possibility, probability, certainty. In seek" ing to arrive at a conclusion in fact in ordinary human " affairs the law rejects mere possibility as an insufficient " basis of proof, but on the other hand it does not exact " absolute or mathematical proof. It is content to proceed " on probability, if it is sufficient, and the test of sufficient " probability is that the direct evidence, with all legitimate " inferences, is such as ought to satisfy the mind of a person of " reasonable intelligence. But the result of a decision on " a question of fact by a judge or a jury is not certainty. It is " finality, not certainty. Your Lordships in considering " a verdict of a jury on a question of fact have often declared " that it is not to be disturbed because there was evidence " on which a reasonable person could so find but that it is not " to be taken that your Lordships would have reached the " same conclusion. Can it be said that in such circum" stances the fact found by the jury has been ascertained with " certainty ? It has been determined with finality in law, " but not with certainty in fact. In my opinion the legis-

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(1) (1894) 21 R. 688, 704.

(2) [1944] Ch. 138, 145.

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" lature in employing the word ' uncertain ' in the section " which the House has to construe was not thinking of the " kind of certainty with which the law has to be content " but was using the word in its ordinary acceptation as " denoting a reasonable element of doubt."

Lord Porter said (1) : " For the appellants it was contended " firstly that though simultaneity of death was theoretically " possible, and perhaps even possible in fact, yet its existence " could never be proved and therefore in all cases where it " could not be shown that one survived the other there was " always such uncertainty as the section requires. Secondly, " that in the present case it was in fact uncertain which of " the four persons concerned survived. There were, it was " said, only two alternatives : either it could be shown who " was the survivor or it could not, and if it could not, the " sequence of death was uncertain. On the part of the " respondents it was maintained that the facts established " instantaneous and contemporaneous death in the case of " each of the four persons, and therefore there was no uncertainty : they all died together. Speaking for myself " I should be inclined to read the section, even without the " previous history, as presenting only two alternatives, viz. :— " (1.) an ability to show the order of death or (2.) uncertainty. " Like Lord Cranworth, I am not sure that the occurrence " of two deaths at exactly the same point of time is possible, " and still less am I inclined to accept the allegation that it " can ever be proved. But quite apart from theoretical " questions of this kind, I think the section itself is so framed " as to exclude the possibility of simultaneous death from " ever being recognized as a certainty and to include it amongst " the uncertainties. It does not speak of uncertainty as to " whether the persons concerned died at the same time, but " seeks to determine which survived the other. It seems to be " concerned with survivorship or no survivorship, and not to " be concerned with some tertium quid which is neither the " one nor the other." Later he says : " Before leaving the " case I should desire to say something as to the amount of " uncertainty required in order to establish that, in a case " such as this, s. 184 applies. It is undoubted law that in " civil cases absolute proof of the fact to be determined is not " required : it is enough if from facts admitted or proved " a reasonable inference can be drawn . . . . But in the

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(1) [1945] A. C. 337.

" present case, under the section, what has to be proved is " not whether there was simultaneous death, or not, but the " certainty of simultaneous death or rather uncertainty as to " who survived whom. I can imagine a court, whether judge " or jury, being asked on a balance of probabilities: Do you " draw the inference that A. and B. died at the same moment " of time? and replying, Yes!; but on the inquirer putting " the further question: But are you certain? I can imagine " the answer being No!"

In construing the will now before me I must decide what the testatrix means by the phrase "simultaneous death." Mr. Stranders and Mr. Buckley in their able argument referred me to the dictionary meaning. I take the dictionary meaning from the Oxford English Dictionary as being "existing, " happening, occurring, operating, etc., at the same time, " coincident in time." Counsel say that that is the plain meaning of the words the testatrix has used and there is no ambiguity which would justify me in looking at the circumstances, to see if the words are not used in some secondary sense. But are they so clear? I think not. Lord Wright in his speech in *Hickman* v. *Peacey* (1) uses language which suggests that it is not so plain. He says: "Suppose the " hypothetical plain man were cross-examined as to what he " meant when he said that the five persons died at the same " time, and were asked whether he meant within the same " minute, or the same second, or what? It may be he would " reply that he was applying the smallest measurement of time " of which he could take cognizance. This may not be very " exact, but it is as exact as expressions like 'the same " 'moment,' or 'the twinkling of an eye' or 'instantaneous' " or 'simultaneous' are in ordinary thought. Different " language would be necessary to specify differences in " measurement imperceptible to ordinary sense which might " be recorded by scientific instruments of almost incredible " delicacy."

The relevant principles of construction are laid down by Lord Romer in his speech in *Perrin* v. *Morgan* (2). Lord Romer says: "My Lords, I take it to be a cardinal rule of " construction that a will should be so construed as to give " effect to the intention of the testator, such intention being " gathered from the language of the will read in the light of the " circumstances in which the will was made. To under-

(1) [1945] A. C. 304, 327.

(2) [1943] A. C. 399, 420.

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" stand the language employed the court is entitled, to use " a familiar expression, to sit in the testator's armchair. " When seated there, however, the court is not entitled to " make a fresh will for the testator merely because it strongly " suspects that the testator did not mean what he has plainly " said—that he was, in fact, one of those persons of whom " Knight Bruce L.J. said that they spoke as if the office of " language were to conceal their thoughts. In many of the " cases to be found in the books the court is reported to have " said that the construction it has put on a will has probably " defeated the testator's intention. If this means, as it ought " to mean, that the court entertains the strong suspicion " to which I have just referred, no sort of objection can be " taken to it, but if it means that the court has felt itself " prevented by some rule of construction from giving effect " to what the language of the will, read in the light of the " circumstances in which it was made, convinces it was the " real intention of the testator, it has misconstrued the will." I think, therefore, I am justified in looking at the circumstances in which the will was made to see what the testatrix meant by the words she has used. Having regard to the date of the codicil, it is clear to my mind that the testatrix's mind was directed to covering the very event which in fact occurred. But she did not in terms say so, and Mr. Buckley says that, once you learn the dictionary meaning, you cannot define the event contemplated, and the codicil is void for uncertainty. I think the answer is that you can define the event in the language suggested by Lord Porter in *Hickman* v. *Peacey* (1). " Sir " Walter Monckton came, I think, nearest to it when he said " there would be simultaneity of death in a case where there " was a common calamity causing instantaneous death in " which it could not be shown that any lapse of time had " occurred between one death and another." It is true that Lord Porter set that argument up as a ninepin which he proceeded metaphysically to knock down, but I have no reason to believe that the testatrix was a metaphysician. I think that the language used by Lord Porter accurately described what the testatrix had in mind and that the language she used is capable of this construction. If that be so, there can be no doubt but that the event contemplated by the testatrix occurred,—the bomb was a common calamity and it caused the instantaneous death of all three sisters.

(1) [1945] A. C. 304, 338.

The conclusion which I have reached may be stated somewhat differently as follows. The mind of the testatrix was directed, not to the establishment of an absolutely scientific truth, but to a correct conclusion in point of law. If, therefore, she meant by " simultaneous death " death at the same moment of time, she meant not death in such circumstances that a metaphysician would hold that simultaneous death had been proved but death in such circumstances that the ordinary man would infer that death was simultaneous. If that be so, I think the observations of Lord Porter lower down on the same page apply to the facts of the present case : " If, however, " the possibility of proving simultaneous death was con- " templated by the section or was practicable, I should be " inclined to say that the facts in the present case go as far, " or nearly as far, as they could to show simultaneous death."

For these reasons I am of opinion that the event contemplated by the codicil has occurred, and that the codicil revokes the will wholly or to the extent to which the estate is effectively disposed of by the codicil.

J. L. D.

The question was then argued, how, if question 1 was answered in the affirmative, the half-share in the income of the estate of the testatrix which, by the codicil, was made payable to Emily Gertrude Pringle was to be disposed of.

Humphrey H. King for the plaintiff.

J. V. Nesbitt for Mary Agnes Matheson. On the true construction of the will and the codicil, the testatrix gave to Mrs. Matheson and to Emily Gertrude Pringle a life interest only. " After the deaths of these two named " means " after " the death of the survivor of them " : *In re Buller* (1), *In re Telfair* (2), and it is not until that has happened that the capital is to go to the testatrix's nephew : *In re Ragdale* (3). Mrs. Matheson therefore takes the income until her death either as surviving joint tenant under an implied joint tenancy, or by way of accruer : *In re Hobson* (4).

Shebbeare for the nephew. The life interests of Mrs. Matheson and Emily Gertrude Pringle were not given to them as joint tenants. Each was given simply a life interest in one-half share of the income. Therefore, on the death of Emily Gertrude Pringle what happened was, not that Mrs. Matheson became entitled for the rest of her life to Emily Gertrude Pringle's half share as well as to her own, but that the nephew, Robert William Elder, became entitled to the capital which produced Emily Gertrude Pringle's half share. [He referred to Jarman on Wills, 7th ed., vol. 3, p. 1776: *In re Errington* (1), *In re Hutchinson's Trusts* (2).

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(1) (1896) 74 L. T. 406.
(2) (1902) 86 L. T. 496.
(3) [1934] Ch. 352.
(4) [1912] 1 Ch. 626.

Stranders for a personal representative of Emily Gertrude Pringle. The personal representatives are entitled, as such, to one half of the income until Mrs. Matheson's death. The argument put forward on Mrs. Matheson's behalf is based on a series of cases in which a life interest was expressly given. Here, life interests are not expressly given to Mrs. Matheson and Emily Gertrude Pringle. Only the words "after the "deaths of these two named the capital to go to my nephew "Robert William Elder" prevent the gift to Mrs. Matheson and Emily Gertrude Pringle from being an unlimited gift of income to them as tenants in common: and, if it were such a gift, they would, of course, get the capital as well. Even as the matter stands, the nephew does not get any of the capital under the gift to him until both sisters are dead. As long, therefore, as Mrs. Matheson is alive, Emily Gertrude Pringle's personal representatives are entitled to Emily Gertrude Pringle's one half share of the income. [He referred to *Bignold* v. *Giles* (3).]

Denys Buckley for a sister of the testatrix interested on intestacy. In view of the wording of the codicil it cannot successfully be contended that the testatrix has left any part of her estate undisposed of.

Mrs. Susan Mildred Elder, another sister of the testatrix, in person.

COHEN J. It is common ground that, to decide this question, I must assume, in accordance with the presumption laid down in s. 184 of the Law of Property Act, 1925, that Emily Gertrude Pringle survived the testatrix, even although by only a small fragment of time. That being so, I have now to consider, on that basis, the effect of the codicil: [His Lordship read it and continued:] Mr. Buckley, for those wishing to support an intestacy, admitted, rightly, I think, that, whatever other construction is possible, it is impossible on the terms of that codicil to treat the testatrix's estate, or

(1) [1927] 1 Ch. 421.
(2) (1882) 21 Ch. D. 811.
(3) (1859) 4 Drewry 343.

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any portion of it, as undisposed of by her will. That leaves me with three alternatives. Mr. Shebbeare, for Robert William Elder, contends that the interests of the sisters were only life interests, and that " after the deaths of these " two named the capital to go to my nephew Robert William " Elder " means that, after the respective deaths of each of them, the capital of their respective shares is to go to Robert William Elder. That, Mr. Shebbeare says, is the correct view in accordance with the principle stated in Jarman on Wills, 7th ed., vol. 3, at p. 1776, in these terms: " But the Court " will not construe the will as postponing the distribution " of every part until the death of the surviving tenant for " life, unless an intention so to do is clearly indicated; although " the gift in remainder is in terms of the whole fund, and " appears therefore to have a simultaneous distribution in " view, yet, if a tenancy in common is more consistent with " the general context, it will be established especially in " favour of children, in spite of the apparently antagonistic " terms."

The second alternative is the claim by Emily Gertrude Pringle's legal personal representatives. On their behalf Mr. Stranders says, first, that there is nothing to indicate that the gift to the two sisters is only for their respective lives, and that, if it were not for the direction as to what was to happen after the death of the two named persons, it would clearly be an unlimited gift of income to them as tenants in common, carrying, therefore, the right to capital. He says next, that the effect of the additional words is merely to cut down their interest, and that their absolute interest comes to an end on the death of the survivor, but that, meanwhile, personal representatives are entitled to one-half of the income. In support of that proposition he cited *Bignold* v. *Giles* (1).

The third alternative which was advanced by Mr. J. V. Nesbitt, on behalf of Mrs. Matheson, is that the testatrix gave to each of her sisters a life interest only, and that the gift of capital was to operate only after the death of the survivor of them: accordingly, he says, in accordance with the principle stated by Parker J., in *In re Hobson* (2), there is either an implied joint tenancy—in which event Mrs. Matheson takes as surviving joint tenant until her death the income of the whole fund—or, alternatively, there is an accruer clause under which the gift goes over to Mrs. Matheson. The principle is

(1) 4 Drewry 343.

(2) [1912] 1 Ch. 626, 631.

stated in these terms by Parker J., in that case: "In my "opinion it is quite clear on the authorities that where there "is a gift equally between A., B., and C. during their "respective lives and after the death of the survivor of them "the whole property is given over, the Court has implied an "intention on the part of the testator that the survivors or "survivor of A., B., and C. shall after the death of one or "more of them be entitled to the whole income down to the "period of distribution . . . ." Then he gives two alternative ways of arriving at the ultimate conclusion.

I must dispose first of the contention advanced on behalf of Emily Gertrude Pringle by Mr. Stranders. I am dealing with a home-made will, and I cannot think that the testatrix, when she directed the interests of her moneys to be divided between two sisters whom she named and, after the death of both of them, gave the capital to her nephew, intended to give anything but a life interest to those sisters. To hold that she intended to give them the capital seems to me entirely contrary to any probability, and to place a strained meaning on the language used. I can distinguish the case which Mr. Stranders cited, I think, on the ground that in that case, at any rate, the testator, when he had left a life interest, or left an annuity, had in terms said so, and it is much more difficult in those circumstances to cut down to a mere life interest an interest which, on the face of the language used, is absolute. Kindersley V.C. said, towards the end of his judgment (1): ". . . . the testator, when "he means to give life annuities, has expressed them to "be for life, from which it may be collected, and the argument "is not without weight, that when he does not so express "himself, he does not intend to limit the duration." Here I have no doubt, on the true construction of the will, that the testatrix did intend to give only a life interest.

Which, then, of the other two constructions should I adopt? Should I take the view that "after the deaths of these two "named the capital to go to my nephew Robert William "Elder," means that after the death of the survivor of them the capital goes to Robert William Elder, or that it means that after the respective deaths of each of them the capital of their respective shares shall go to the nephew Robert William Elder? On the whole, though not without some doubt, I have come to the conclusion that the argument advanced

(1) 4 Drewry, 343, 347.

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by Mr. Nesbitt for Mrs. Matheson is correct, and that the testatrix intended to dispose of the whole of the capital only after the death of the survivor of those two sisters. It seems to me that that fits in with the general scheme under which one generation, sisters, take, and on the death of the last survivor of the two named persons, after the death of the survivor of that generation, it goes over, not to their children, but to another name. As I have said, it is a matter of construction in each case. It seems to me, on the whole, that if I read " after the deaths of these two named " as meaning after the death of the last survivor of them, it is a construction of the will which does least violence to its language and one which I think is in accordance with decisions such as that of Farwell J., in *In re Ragdale* (1). I think that, once I get to the stage of holding that the gifts to the sisters were only life interests, *In re Ragdale* (1) is an authority which justifies the decision to which I have come.

Accordingly, I will declare that Emily Gertrude Pringle's half-share of the income is payable to Mrs. Matheson during the remainder of her life, and I direct that the costs of all parties be taxed as between solicitor and client and paid out of the estate.

Solicitors : *G. F. Hudson, Matthews & Co.; R. S. Jackson and Bowles.*

K. R. A. H.

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(1) [1934] Ch. 352.

In re FOSTER.

ROMER
J.

1945

Nov. 23;
Dec. 21.

COOMBER *v.* GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE MAINTENANCE AND EDUCATION OF EXPOSED AND DESERTED YOUNG CHILDREN.

Will—Construction—Bequest of residue to be divided equally between testator's brother and sisters during their lifetime, but after their death to be evenly distributed between testator's nephews and nieces.

A testator bequeathed " the residue of my estate to be divided " equally between my brother and my four sisters during their " lifetime but after their death to be evenly distributed between " my nephews and nieces." The brother died soon after the testator :—

ROMER J.

1945

FOSTER, *In re.*

Held, that the income was divisible equally between the testator's four sisters and the survivor or survivors of them for the time being and, on the death of the last survivor, the capital was divisible among the testator's nephews and nieces.

In re Hutchinson's Trusts (1882) 21 Ch. D. 811, and *In re Errington* [1927] 1 Ch. 421, considered.

ADJOURNED SUMMONS.

By his will dated October 14, 1936, Thomas Oliphant Foster directed as follows: "The residue of my estate to "be divided equally between my brother and my four sisters "during their life time but after their death to be equally "divided between my nephews and nieces." The testator died on March 12, 1942. On September 9, 1942, the executor of the will took out a summons to determine whether the income of the residuary estate was divisible equally between the testator's brother and four sisters and the survivors and survivor of them for the time being and, on the death of the last survivor, the whole of the capital was distributable among the testator's nephews and nieces, or whether as and when each brother and sister of the testator died the capital producing his or her share of the income became distributable among his or her children, or, alternatively, among all the testator's nephews and nieces, or whether on such death the income previously payable to such deceased brother or sister became undisposed of until the death of the last survivor of the brother and sisters, or how otherwise the income and capital of the residuary estate ought to be dealt with.

An order was made, at that time, which was confined to a declaration that the income of the residuary estate of the testator was divisible equally between the testator's brother and four sisters during their joint lives. The rest of the question was directed to stand over with liberty to apply. Subsequently, on July 17, 1943, the testator's brother died and the summons was restored for the further consideration of the question.

G. D. Johnston for the plaintiff.

C. A. J. Bonner, P. J. Sykes and *Cecil W. Turner,* for various defendants.

Cur. adv. vult.

Dec. 21. ROMER J., reading a judgment, said: In this case I should, unaided by authority, come to the conclusion that on the true construction of the testator's residuary disposition the gift to the nephews and nieces was not intended to take effect until the death of the survivor of the testator's brother and four sisters, and that until that event occurred the brother and sisters for the time being alive would share the income equally between them, and that the survivor would take the whole income for the remainder of his or her life. The reasons that would lead me to this conclusion are as follows : It is clear in the first place that, as each brother and sister dies, his or her interest in the estate ceases. It is equally clear that the interest of all of them does not cease with the death of one. Accordingly I read " during their " life time " as meaning " during their respective lives." Having created these interests, the testator then turns his attention to the passing of a particular subject matter at a particular point of time. What then is the subject matter and what is the point of time ? The subject matter would appear to be that which the testator has already described at the beginning of the disposition, namely : " the residue of my " estate." That is an expression which, if taken by itself, can mean only one thing, namely, the estate as a whole. Then what is the point of time at which the estate as a whole is to go to the nephews and nieces ? It is expressed to be after the death of the brother and sisters. I should have thought that it would be difficult to say that that point of time had been reached while one or more of the brother and sisters were still alive and that it could not be said to have arrived until all of them were dead. It is suggested, however, that the prima facie conclusions which I have indicated, both as to the subject matter of the ultimate gift and as to the time when it was to take effect, are erroneous having regard to the authorities relating to this kind of disposition which are to be found in the reports. These authorities, it is argued, demonstrate that as each brother and sister dies the aliquot share of income set free by his or her death becomes payable thenceforth to the nephews and nieces who, but for the still subsisting income interests of such of the other first takers as survive, would immediately become entitled to payment of an aliquot share of capital. In other words, it is said that the gift to the nephews and nieces which follows the disposition in favour of the brother and sisters should read in some such sense as " but after their respective deaths their respective shares of " or interests in the residue of my estate are to be evenly " distributed between my nephews and nieces."

ROMER J.

1945

FOSTER, *In re.*

I will refer now to the authorities, some of which are not easily reconcilable. *Abrey* v. *Newman* (1) was a decision of Sir John Romilly, M.R. In that case the testator, after having given certain personal estate to his wife for life, proceeded as follows: " All the above-named property to be " equally divided between Benjamin James and his wife " Ann James, and Charles Abrey and his wife, for the period " of their natural lives, after which, to be equally divided " between their children; that is to say, the children of " Benjamin James and Charles Abrey above mentioned." Sir John Romilly's decision involved the view that the words " after which " meant " after their respective deaths." Benjamin James and Ann his wife had both died, leaving children; the wife of Charles Abrey was also dead leaving children surviving her by Charles Abrey, who was still alive. The learned Judge, after observing, first that the share given to Benjamin and Ann was given in the first instance to the parent and the gift afterwards was to take effect on the death of that parent, and secondly that it was not possible to read " their " children " as " their respective children " because of the subsequent words " that is to say, the children of Benjamin " James and Charles Abrey." *Held*, that on the death of Benjamin James and his wife their share was divisible per capita among the children of Benjamin James and of Charles Abrey.

In re Hutchinson's Trusts (2) was a decision of Kay J. In that case a testatrix bequeathed personalty in trust for A. B. for life, and after his decease for his issue, and on failure of his issue to F. H. S. and R. S. share and share alike, " and after " the decease of the said F. H. S. and R. S. to their children " share and share alike, and to their heirs for ever." F. H. S. died without having had issue, R. S. survived him and died leaving children, and A. B., who survived them both, died without issue. The learned judge found himself constrained by the authorities, and contrary to the inclination of his own mind, to construe the bequest as a gift after the respective deaths of F. H. S. and R. S. to their respective children, with the result that as there had been an absolute gift to each of them in the first instance, only cut down in favour of his children, in the events which happened the fund was divisible in moieties between the representatives of F. H. S. and the children of R. S. Kay J., after reviewing the relevant cases

(1) (1852) 16 B. 431.

(2) (1882) 21 Ch. D. 811, 816.

which had been decided down to that time, expressed himself as follows: "The balance of authority seems to me, therefore, "to show that there has been laid down what I must consider "rather an artificial rule, a rule which I suppose has considerable advantages, if both the tenants for life, or the "persons to whom the interest was first given have children; "but in this case one of them has died before the other without "issue; and the question is, under those circumstances, how "the gift is to be construed. I think I am bound by authority "to say that the words 'after the decease of the said Francis "'Hutchinson Synge and his brother Robert Synge,' mean "after their respective deaths, or after the decease of each of "them, and that there is a disposition of the share of each "which was an absolute interest in the first instance upon "his death. Now what is the disposition? It is to their "children. Well, following the decisions, and considerably "assisted, I must say, by an argument which Mr. Hastings "used, and which I adopt, that in that place this must mean "their respective children, because there could not possibly "be any child who could say I am the child of both, I am "bound to read 'after the death' as meaning 'after the "'death of each,' and 'to their children' as 'to their respective "'children.' I admit the force of Mr. Hastings' argument "on that part of the gift; and I think these authorities have "laid down a rule of construction which I am bound to follow; "therefore, I so decide." The learned judge arrived at this decision notwithstanding that (as he pointed out earlier in his judgment) it involved the addition at least of the word "respective" once, if not more than once, to the language which the testatrix had actually used.

In *In re Browne's Will Trusts* (1) Sargant J. had to consider a disposition by a testator of an estate to trustees "upon "trust to pay the income thereof to each of such of my said "six nieces as shall be living . . . . at the time of" the death of "the survivor of my said wife and son, for and "during the respective lives of my said nieces, and, from and "after the decease of my said six nieces, to stand possessed "of my said trust estate and the income thereof," upon trust for such children of the testator's son as should be living at the son's death. Three only of the six nieces survived the testator's widow and son, and these three were all living. The son left one child him surviving; and it was held that as

(1) [1915] 1 Ch. 690.

each niece died, her share of the income would not belong to her legal personal representative until the death of the last surviving niece, and would not go over to the surviving nieces or niece, and that there would not be an intestacy as to such share of income until the death of the last surviving niece; but that, as each niece died, her share of income would go immediately to the remainderman, the son's child. Sargant J. after pointing out that four possible constructions had been argued before him, said that the real difficulty lay between two of them, namely, whether the income went equally between the survivors or survivor of the nieces for the time being or whether on the death of each niece the ultimate gift to the remainderman took effect in respect of her share. The learned Judge, after referring to certain authorities (including *In re Hutchinson's Trusts* (1)) came to the conclusion that the latter of these two constructions was the right one. He read the words " from and after the decease of my said six " nieces " as meaning " from and after the decease of my " said six nieces respectively " or " from and after the deceases " of my said six nieces." He was assisted to this interpretation by the precision of the preceding words " during the respective " lives of my said nieces " and by the rule of construction that such words as " from and after my decease " are proper words of remainder and are often merely equivalent to " subject " to " or " on the cesser of " the preceding interests. It is to be observed that in this case the donee in remainder was not the child of any of the tenants for life who took preceding interests in income.

In *In re Errington* (2) a testator gave the income of one-third part of his residuary estate to his daughter E. for her own absolute use and benefit, and from and after her decease such one-third part was to be divisible between his daughters J. G. and S. L., or " if dead between their issue share and " share alike." J. G. died in the lifetime of E., leaving issue. Lord Romer (then Romer J.) held that on the death of E. the issue of J. G. took a moiety of the one-third part of the testator's residuary estate in equal shares per capita. In the course of his judgment, he said: " There is a rule of con" struction referred to by Kay J. in *In re Hutchinson's* " *Trusts* (1) which is so binding that Kay J. felt, in the case " before him, compelled to give effect to it, although but for " the authorities laying down that rule of construction he

(1) 21 Ch. D. 811.

(2) [1927] 1 Ch. 421.

"would have decided differently. The rule, stated in its "simplest way, is this: Where a testator gives the income of "his estate to two people, A. and B., for their lives and follows "that gift by a direction that at their death, or at their deaths, "or at or after the death or deaths of A. and B. the property "is to go to their issue, the court does not construe the gift "as a gift only to take effect on the death of both in favour "of the issue of both, but construes it as a gift, to take effect "on the death of each, of the share to the income of which the "deceased was entitled, to the issue of the deceased. So that "in the simple cases to which I refer, on the death of A. "leaving issue, the issue of A. would take one-half notwith"standing the fact that B. still was living. On the death of "B., B.'s issue in the same way would take the share in which "B. had a life interest. Now, it is true that the cases in "which that rule has been applied were cases of original "gifts. But I see no reason at all why the rule should not "equally apply to cases of substitutional gifts. The rule "admittedly applies, as was laid down by Kay J., where there "is a gift to A. and B., not expressly for life, but a gift to "A. and B., followed by an original gift in favour of the issue "of A. and B. expressed to take effect in the event of the "deaths or on the deaths of A. and B. In such a case Kay J. "held that on the death of one his issue took his share. "I myself see no difference between that case and a gift to "A. and B. with a substitutional gift in favour of their issue "to take effect in the event of their deaths. I think in such "a case the court ought to construe the gift as a gift to A. and "B., with a substitutional gift of A.'s share in favour of his "issue, and B.'s share in favour of his issue. It is a rule "which appears to me to be one that has this supreme merit, "a merit that not all rules of construction possess, that in the "vast majority of cases it gives effect to the intention of the "testator."

I must now refer to three cases in which a different view was taken as to the effect of gifts of a similar character to those which were before the court in the cases I have cited. The first is *In re Telfair* (1), a decision of Farwell J. There a testator gave the income of his residuary estate to E. W. G. and H. H. G. "in equal parts—that is to say, that they shall "each receive the half amount of the interest during their "natural lives." After "their deaths" the income was

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(1) (1902) 86 L. T. 496.

ROMER J.

1945

FOSTER, *In re.*

given to one of his wife's nieces for life and after her death to another of his wife's nieces for life and after the death of the latter niece the corpus was given to a charitable institution. E. W. G. died leaving the testator's widow her surviving. The widow then died and the question for the court was whether H. H. G. was entitled during her life to the whole of the income of the residuary estate. Farwell J. decided that she was. In his view, different generations were provided for by the will in due order and he found that the whole estate was to go over on the death of both E. W. G. and H. H. G. There was an implied gift to the survivor of them, he said, and the wife's nieces took only subject to their interests. The learned judge thought that the testator intended that the survivor of E. W. G. and H. H. G. should take the whole income for her life and that the entire interest was given after the deaths of both. In *In re Ragdale* (1) a testator devised and bequeathed the residue of his estate to the Public Trustee on trust for sale and conversion and to pay one-half of the net income arising from the fund so created to R. and the other half to T. and " from and after their " decease " to pay the principal as well as the income to a hospital fund. R. predeceased the testator. The question arose whether there was an intestacy as regards R.'s share and, if not, whether it was payable, both capital and income, to the charity or whether R.'s share of income was payable to T. for her life. *In re Telfair* (2) and *In re Browne's Will Trusts* (3) were cited to Farwell J. before whom the case came, but not, apparently, *In re Hutchinson's Trusts* (4) or *In re Errington* (5). The learned judge, after observing that he had to construe the will on the language used and ascertain the intention from that language, expressed himself as follows : " I think I can find in the language of the will two possible " alternatives : one in favour of the hospital fund to take " immediately, the other that the survivor of the ladies takes " the disputed half-share of the income for her life. On the " one side if I prefer the hospital fund I have to read ' after " ' their decease ' as ' after their respective deaths ' ; on the " other I have to read into the will that which is not in the " will. In my opinion, on the true interpretation of the will, " the testator did not intend that the hospital fund should

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(1) [1934] Ch. 352.

(2) 86 L. T. 496.

(3) [1915] 1 Ch. 690.

(4) 21 Ch. D. 811.

(5) [1927] 1 Ch. 421.

"take till both ladies were dead, and so I cannot read 'after "'their decease' as 'after their respective decease'." Looking to all the terms of the will, Farwell J. came to the conclusion that the hospital did not take until the death of T. and that T. was entitled to the disputed half-share of the income for her life.

The last case to which I need refer is *In re Riall* (1). The testatrix in that case directed her trustees, after payment of certain legacies, to divide the balance of her residuary estate into two equal parts and to pay the income from one moiety to one of her two sisters for life, and, after her death, to pay the income of that moiety to that sister's husband (who, however, predeceased the testatrix). The income of the other moiety was given to her other sister for life. On the death of the last survivor of the life tenants, the residuary estate was to be divided among a number of charitable institutions. The trusts of the first moiety having determined on the death of the first sister, the question arose whether cross-remainders could be implied so as to entitle the surviving life tenant during the remainder of her life to the income to which the deceased life tenant had been entitled, or whether during this period such income passed to the charitable institutions or passed as on an intestacy. The case was heard by Simonds J. and among the cases cited to him were *In re Telfair* (2) and *In re Ragdale* (3), but not, apparently *In re Hutchinson's Trusts* (4), *In re Browne's Will Trusts* (5) or *In re Errington* (6). In the view of the learned judge, the position was governed by the decision of Farwell J. in *In re Ragdale* (3). He came to the conclusion that the testatrix's intention was that the tenants for life should receive the whole income from the residuary estate until the death of the last survivor of them and that only then should the charitable institutions mentioned in the will become entitled to their shares in the capital of the residue. He accordingly held that the released income ought to be paid to the surviving life tenant during the remainder of her life.

In the present case the first takers are the only brother and sisters that the testator had and it accordingly follows that the second takers, the testator's nephews and nieces, are necessarily the issue of the first. Certain admissions were rightly made before me during the course of the argument.

(1) [1939] 3 All E. R. 657.
(2) 86 L. T. 496.
(3) [1934] Ch. 352.
(4) 21 Ch. D. 811.
(5) [1915] 1 Ch. 690.
(6) [1927] 1 Ch. 421.

In the first place, it was admitted that there was no intestacy arising by reason of the death of the testator's brother, whatever else might be the true destination of the income which he had enjoyed or of the share of the estate which produced it. Secondly, it was conceded that whatever benefits the nephews and nieces take they take as a class per capita and not under a stirpital distribution; and, thirdly, it was admitted that the nephews and nieces must in any event await the deaths of all the testator's sisters before becoming entitled to a payment of capital. The alternative constructions accordingly between which I must choose are, on the one hand, that the testator's sisters take between them the one-fifth share of income which their brother enjoyed during his lifetime and, on the other hand, that such share of income passed on the brother's death immediately to the nephews and nieces. As I have indicated earlier, my inclination is in favour of the former construction unless I am compelled, by reason of what I may call the rule in *In re Hutchinson's Trusts* (1) to adopt the latter. On a consideration of the cases to which I have referred, I have come to the following conclusions as to the proper application of this rule: (1.) It applies in general where the gift to the second takers, being issue of the first takers, can fairly be construed as a gift to them per stirpes; (2.) Its application is not imperative where the second takers are either not issue of the first takers at all or, being such issue, the gift in their favour is, on construction, a gift to them per capita; and (3.) the rule may be displaced by a sufficiently clear indication of intention on the part of the testator, to be gathered from the will as a whole, that the estate or fund in question, when passing to the second takers, is to pass to them as one entirety or mass. I am aware that there may be some inconsistency between the second and third qualifications to the rule which I have mentioned and the decisions in such cases as *Abrey* v. *Newman* (2) and *In re Browne's Will Trusts* (3). Nevertheless, such qualifications appear to me to be compatible on the one hand with the statement of the general rule by Romer J. in *In re Errington* (4) and on the other hand with the decisions in *In re Telfair* (5), *In re Ragdale* (6) and *In re Riall* (7), in none of which was the rule applied. Moreover, a too rigid

(1) 21 Ch. D. 811.
(2) 16 B. 431.
(3) [1915] 1 Ch. 690.
(4) [1927] 1 Ch. 421.
(5) 86 L. T. 496.
(6) [1934] Ch. 352.
(7) [1939] 3 All E. R. 657.

application of the rule would in many cases destroy what Romer J. recognized as its general merit, namely, that it gives effect to the probable intention of testators. I have earlier indicated that my own view of the will now before me is that the testator intended his residuary estate to go over as an entirety, and not in successive shares, to the nephews and nieces at a given time ; and it is, moreover, clear that they take per capita and not per stirpes.

In my judgment, accordingly, the case is not one to which the rule imperatively applies and I am free to decide, as I do decide, that the income of the testator's residuary estate is divisible equally between the testator's four sisters and the survivors or survivor of them for the time being and on the death of the last survivor the whole capital of the estate will be distributable among the testator's nephews and nieces. I will make a declaration accordingly.

Solicitors : *Wetherfield, Baines & Baines ; Radcliffes & Co.*

J. L. D.

BRADING *v.* F. McNEILL & COMPANY LIMITED.

EVERSHED J.

1945

Dec. 11, 12, 13, 14.

Contract—Sale of works, lease, plant and stock—Breach of contract by vendor—Alteration by purchaser after offer for sale of own position in relation to subject-matter—Measure of damages.

The defendant company offered to sell to the plaintiff a porous pipe works and plant, the lease thereof and the defendant company's stock of porous pipes. The plaintiff could not himself provide the purchase price and contracted with the L. Company that the works, plant, lease and pipes, should be assigned to the L. Company, and they should provide the purchase price and afterwards employ him as the manager of the business at a stated salary. The plaintiff thereupon accepted the defendant company's offer, but at a later date the defendant company repudiated its contract with the plaintiff. The value of the factory, plant, lease and pipes at the date of the repudiation was considerably greater than it was when their contract with the plaintiff was concluded. The plaintiff brought against the defendant company an action which ultimately was confined to a claim for damages and the only substantial question in issue was the measure of damages :—

Held, that, in assessing the damages, the court ought not to take into account that the plaintiff had made with the L. Company a contract by which, but for the repudiation, the works, plant, lease and pipes would have passed to the L. Company and the plaintiff would have been employed by it; and that the measure of damages was the difference between the contract price and the value of the property at the date of the repudiation.

Rodocanachi v. *Milburn* (1886) 18 Q. B. D. 67 considered and applied.

WITNESS ACTION.

On January 3, 1945, the chairman of the defendant company, on that company's behalf, wrote to the plaintiff that he was willing for the plaintiff and/or his friends to acquire and pay in cash for the defendant company's porous pipe works for 1,000*l.* and to acquire the whole stock of porous pipes at cost, that the defendant company would assign the lease of the works without further consideration, that the offer would remain open until January 31, and that the plaintiff's services with the defendant company would end on March 31, 1945. On January 12, 1945, a Mr. Bond, joint managing director of Limmer and Trinidad Lake Asphalt Co., Ld. (hereinafter called "the Limmer Company") wrote to the plaintiff a letter recording an arrangement, which had been agreed with the plaintiff, that the works, lease, plant and stock should be assigned, not to the plaintiff, but to the Limmer Company, which would pay for them and that the Limmer Company would thereupon employ the plaintiff to manage the business at a salary of 750*l.* a year, plus a commission to be agreed. Nothing was determined as to the length of the plaintiff's engagement. On the same day the plaintiff wrote to the chairman of the defendant company that his arrangements to buy were advanced enough for him to accept the offer and asked him to accept that letter as formal notice of acceptance. That letter was acknowledged on the same day. On January 18, 1945, the chairman of the defendant company, on its behalf, wrote to the plaintiff repudiating all further obligation under the contract. The sale was to have been of the lease, the buildings and the stock of pipes for 3,289*l.* 11*s.* 3*d.* On January 18, 1945, their value was 6,153*l.* By this action the plaintiff, by his statement of claim, claimed, inter alia, specific performance of the contract or, alternatively, damages for breach thereof, but at the hearing the only claim pursued by the plaintiff was the claim for damages, and the only substantial question left for the court to decide was the measure of damages.

Valentine Holmes K.C. and *Patrick O'Connor* for the plaintiff. The plaintiff has clearly suffered damage by reason of the defendant company's breach of contract. He does not claim damage in respect of the loss of his employment by the Limmer Company as manager of the business. Excluding that, however, the court ought to award him such a sum as will put him, financially, in the position in which he would have been had the contract been performed: *Robinson* v. *Harman* (1), taking into account the fact that he at least runs the risk of proceedings by the Limmer Company against himself because the property has not been transferred to the Limmer Company, and the fact that he has lost the goodwill of the business. In *Rodocanachi* v. *Milburn* (2) the rule in *Robinson* v. *Harman* (1) was applied: and Lord Esher M.R. enunciated what may be called the principle in *Rodocanachi* v. *Milburn* (2) by stating, as being well settled, the rule that in an action for non-delivery or non-acceptance of goods, the law does not take into account anything that is accidental as between the plaintiff and the defendant, giving, as an example, an intermediate contract entered into with a third party for the purchase or sale of the goods. In the present case, the circumstance that the plaintiff could not himself provide the purchase money and therefore entered into the arrangement with the Limmer Company is purely accidental to the plaintiff as between him and the defendant company. In *Williams Bros., Ld.* v. *Ed. T. Agius, Ld.* (3), A. agreed to sell to W. coal to be shipped in November, 1911, at 16*s.* 3*d.* a ton, and did not deliver the coal. In October, 1911, W. agreed to sell to G. coal of the same amount and description at 19*s.* a ton. In November, 1911, G. sold to A. at 20*s.* a ton the coal which he had bought from W. and ceded to A. his rights and liabilities under his contract with W. When A. had failed to deliver the coal to W. the market price of coal was 23*s.* 6*d.* a ton: and the House of Lords held that the measure of damages was not the difference between 16*s.* 3*d.*—the contract price—and 19*s.*—the price at which W. sold to G.—but was the difference between the contract price and the market price at the time of the breach. In that case, which is a case of a "string" contract, *Rodocanachi* v. *Milburn* (2) was approved. Likewise, in the present case, the true measure of damage is the difference between 3,289*l.* 11*s.* 3*d.*—the contract price—and 6,153*l.*, the value of the property at the date of the repudiation, together with an amount for the loss of the goodwill. It is clear that, at the date of its contract with the plaintiff, it was a financial gain of those dimensions that the defendant company meant the plaintiff to have : *Hadley* v. *Baxendale* (1). Neither reports nor textbooks appear to include any case where the principle in *Rodocanachi* v. *Milburn* (2) has been held to apply to real property. If, however, there are cases in which it is not to apply, the court is probably going to be in considerable difficulty in those cases : for, if the law is to take into account something that is accidental to one party as between himself and the other party, the matter in question may be known only to the party to whom it is accidental, with the result that the other party will not be able to assist the court with regard to it.

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(1) (1848) 1 Ex. 850.

(2) [1886] 18 Q. B. D. 67, 77.

(3) [1914] A. C. 510.

Harman K.C. and *A. C. Nesbitt* for the defendant company. The plaintiff ceased to be the prospective purchaser of the property when he arranged that the Limmer Company, and not he, should provide the purchase money and take the transfer. Thenceforward he was merely the man who put the Limmer Company in the way of buying the property. Thus, he has suffered either no damage at all, or, at most, damage which is represented by the loss of the employment promised to him by the Limmer Company, which he does not claim. The rule in *Robinson* v. *Harman* (3) provides that a party to a contract who suffers loss through the other party's breach of it is, so far as money can achieve it, to be put in the position in which he would have been had the contract been performed. The principle in *Rodocanachi* v. *Milburn* (2) adds a rider to that by providing that the court, in deciding the amount of the damages, shall disregard anything that is accidental to either party as between himself and the other party. In the present case, however, the plaintiff made his arrangement with the Limmer Company after he had received, but before he had accepted, the defendant company's offer. That constitutes an alteration of his position in relation to the subject matter of the contract and is something which the court will not disregard. The principle in *Rodocanachi* v. *Milburn* (2) is a rule of commercial convenience, and its application cannot be required in the present case. It is confined to cases of dealings in goods which have a market value in the sense that it is possible to go into the market and buy them there. Different

(1) (1854) 9 Ex. 341, Smith's Leading Cases, 13th ed., vol. 2, p. 529.

(2) 18 Q. B. D. 67.

(3) 1 Ex. 850.

considerations apply to specific goods with regard to which actions for specific performance will lie. These porous pipes cannot be obtained anywhere. They have no market price and it would be ridiculous to contend that they have a market value.

Patrick O'Connor replied.

EVERSHED J. Clearly, the contract in question does not include anything which can be described as goodwill, or which would entitle the plaintiff to damages consisting of, or estimated from, the past profits of the business of manufacturing and selling porous pipes. The items specified are all priced, including the lease, because it is said in terms that no consideration will be required for the transfer of the lease. I do not know under what head or item it is suggested that goodwill passed, or what price it is suggested that the plaintiff was to pay for it. All the characteristics usually accompanying a sale of goodwill are absent in this case and I hold that nothing in the contract would entitle the plaintiff to say that he had acquired a goodwill, or to add to any other damages that he can claim a sum to compensate him for an estimated loss of profit in carrying on a business on this site.

Here, then, was a contract for the sale of a lease, plant and buildings and a stock of pipes, at an admitted total price of 3,289*l*. 11*s*. 3*d*. It is admitted, also, that, on January 18, 1945—the date of the repudiation—the value of those assets was 6,153*l*. The difference, therefore, between the value of the assets at the date of repudiation and the price which the plaintiff should have paid was 2,863*l*. 8*s*. 9*d*. which, prima facie, is the proper measure of damages.

In deciding what damages, if any, ought to be awarded for breach of contract, the court ought, first, to look to the general rule stated, for example, by Parke B. in *Robinson* v. *Harman* (1), that " . . . . where a party sustains a loss by reason of a breach " of contract, he is, so far as money can do it, to be placed " in the same situation, with respect to damages, as if the " contract had been performed." I do not overlook that Parke B. mentions one exception with regard to real property but that exception is irrevelant here. That rule is logical and just, but, in applying it, the court has to consider what notice it will take of any alteration by the plaintiff of his own position in relation to the subject-matter of the contract, made by him

(1) 1 Ex. 850.

either before or after the contract. Were the matter free from authority, much could be said for considering the facts, as proved, including the circumstances of any arrangements made by the plaintiff with the Limmer Company and trying in the light of those circumstances, to follow the rule of *Robinson* v. *Harman* (1) by placing the plaintiff, in terms of money, in the same situation as if the contract had been performed and as if the other facts had occurred and arrangements been made as, on the evidence, clearly would have occurred and been made. I am not to be taken as saying that if that principle were carried out it would necessarily follow that the plaintiff would suffer no damage or merely nominal damage: the result, however, might differ from the simple arithmetical conclusion which follows from subtracting 3,289*l.* 11*s.* 3*d.* from 6,153*l.* But decisions, which bind this court, with reference to the sale of goods and of shares, show that—with regard, at any rate, to that class of contract—the court should not look at what are called matters accidental to the plaintiff, particularly sub-contracts made by a plaintiff at a sum either greater or less than the true value of the property in suit. The main exposition of that principle is in *Rodocanachi* v. *Milburn* (2), and the soundness of the judgment of the court in that case has been expressly and resolutely affirmed by the House of Lords in *Williams Bros., Ld.* v. *Ed. T. Agius, Ld.* (3), among those present in the House being Lord Parker, a former judge of the Chancery Division. True, counsel in the present case have not been able to find a decision whether a like principle should or should not be applied where the subject-matter of the case is real property. Clearly, there might well be, with regard to land, a series of transactions similar to the series in *Williams Bros. Ld.* v. *Ed. T. Agius, Ld.* (3)—what Mr. Valentine Holmes, no doubt with familiarity greater than mine, called " string " contracts —and it might be that, in such case, the original purchaser sued at some stage for specific performance : but counsel have not found in the books any case on facts such as these. It is, however, argued for the defendant company that the principle in *Rodocanachi* v. *Milburn* (2) ought to be confined to a particular type of case, and is a gloss on, or rider to, the more general rule enunciated by Parke B. in *Robinson* v. *Harman* (1). It is argued also that there is a difference where the sub-contract

(1) 1 Ex. 850.

(2) 18 Q. B. D. 67.

(3) [1914] A. C. 510.

—the matter accidental to the plaintiff—is made before the main contract on which action is brought. With reference to the first argument, Mr. Harman, for the defendant company, contends that a different consideration ought to apply if the plaintiff sues for specific performance or if, having regard to the subject-matter of the contract, an action for specific performance could be entertained.

Having anxiously considered that matter and carefully read the judgments in *Rodocanachi* v. *Milburn* (1) and *Williams Bros., Ld.* v. *Ed. T. Agius, Ld.* (2) I conclude that two points are clear. First, in *Rodocanachi* v. *Milburn* (1) none of the three judges thought that they were doing other than applying the normal general rule. None of them supposed that the decision in *Rodocanachi* v. *Milburn* (1) was a special case —a gloss on the more general rule in *Robinson* v. *Harman* (3) to be applied where it would give or provide commercial convenience. For example, Lord Esher M.R. stated it as follows (4): "It is well settled that in an action for non-"delivery or non-acceptance of goods under a contract of "sale, the law does not take into account in estimating the "damages anything that is accidental as between the plaintiff "and the defendant, as for instance an intermediate contract "entered into with a third party for the purchase or sale of "the goods." Both the other judges said in like terms that that is a well-settled rule and, as I have said, the House of Lords, in *Williams Bros., Ld.* v. *Ed. T. Agius, Ld.* (2) affirmed these judgments.

Secondly, as I understand the matter, there would, in my judgment, be great difficulty in finding a satisfactory dividing line between the class of case in which the principle in *Rodocanachi* v. *Milburn* (1) should be applied, and the class of case in which it should not. I am not satisfied that the answer to the question whether specific performance could be sought would be a logical, just or satisfactory dividing line—particularly in view of the considerable expansion of the cases in which specific performance can now be sought. Moreover, the contract in the present case may fairly be described as a "business or "commercial transaction," in so far as that phrase has any precise meaning. Further, it is true, as Mr. Valentine Holmes has pointed out, that, if the principle in *Rodocanachi* v. *Milburn* (1) is not to be applied, the court may well have to investigate, very elaborately and extensively, matters of which one party to the action would or might be wholly ignorant and the court would thus have no means of testing the evidence given. Also, as Mr. Valentine Holmes has said, where there are sub-contracts, a plaintiff suing on a head contract for damages may himself be liable to be sued for damages by his sub-purchaser and it may, therefore be proper and desirable to take into account that liability and to dispose of the whole matter once and for all, so that the plaintiff in the head action may be indemnified. In the present case, if there be a contract with the Limmer Company, it is at least theoretically possible —though, having seen Mr. Bond, I consider it unlikely—that the plaintiff might be sued for damages for failing to procure the transfer of the property to the Limmer Company.

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(1) 18 Q. B. D. 67.

(2) [1914] A. C. 510.

(3) 1 Ex. 850.

(4) 18 Q. B. D. 67, 77.

On the other hand, I confess I am not entirely happy in my mind and I must not be taken to decide whether it would be just or logical strictly to apply the principle in *Rodocanachi* v. *Milburn* (1) in all cases. It may well be that, at some time and in some court, it will be desirable to consider the scope of the cases to which it ought to be applied. It might appear at first sight that there should be a distinction between cases in which the matter accidental to the purchaser was a sub-sale by him at an enhanced profit and a case where the purchaser was passing the property on without any profit to him at all, or at less than market price. But it seems clear from the two authorities cited that there is no ground for such a distinction, both the authorities being in fact cases (like the present) of the latter kind. However that may be, I do not propose, in the present case, to formulate a general proposition that the principle ought to be applied in all cases dealing with sales of all types of property. I conclude, however, that, in all the circumstances, it ought to be applied in the present case, that, in assessing the damages, I ought not to take into account that the plaintiff had made with the Limmer Company a contract under which, but for the repudiation, the property would have passed to the Limmer Company and the plaintiff would have become its servant. His inability to provide finance was, in the circumstances, accidental to him, all the more so because, as the case has developed, the question of his readiness and ability to perform the contract has never really been in issue. I conclude that the damages here ought to be assessed on the principle applied in *Rodocanachi* v. *Milburn* (1), and I so conclude with

(1) 18 Q. B. D. 67.

the greater satisfaction because I think that the result will be just.

Clearly, when the offer was made the defendant company contemplated giving and intended to give to the plaintiff a benefit of monetary value substantially equivalent to the difference between the real value of the property and its contract price. In *Hadley* v. *Baxendale* (1) it is stated, in the headnote: "Where two parties have made a contract, which one of them "has broken, the damages which the other party ought to "receive in respect of the breach of contract should be such as "may fairly and reasonably be considered either arising "naturally, that is, according to the usual course of things, from "the breach of contract itself, or such as may reasonably be "supposed to have been in the contemplation of both parties at "the time they made the contract, as the probable result of the "breach of it." That I cite to show or to emphasize the point that, in my judgment, the defendant company contemplated conferring on the plaintiff, by the contract, a benefit represented in money by the calculation which I have stated.

I have the greater satisfaction, also, because, from the evidence of Mr. Bond, it seems by no means improbable that the plaintiff would have been given a contract or service agreement for a term of years. After all, the plaintiff was conferring, or was in a position to confer, on the Limmer Company an asset of some value and, had he been given a service agreement for a term of years, the value of that agreement might well have been, arithmetically, not very different from the result of subtracting 3,289*l.* 11*s.* 3*d.* from 6,153*l.* I do not forget that that way of estimating damages is not open in the present case. I state merely that, bearing it in mind, I am confirmed in thinking that my conclusion is not unjust. Accordingly, the plaintiff is entitled to 2,863*l.* 8*s.* 9*d.*

Solicitors: *Wild, Collins & Cross; Merrimans.*

(1) 9 Ex. 341. Smith's Leading Cases, 13th ed., vol. 2, p. 529.

K. R. A. H.

C. A.

1946

Jan. 23.

Lord Greene M.R., Morton and Bucknill L.JJ.

In re LITT; PARRY *v.* COOPER.

Will—Construction—Bequest to children—Children's shares settled—Accruer provisions—Application of rule in Lassence v. *Tierney.*

The testator, who died in 1907, by his will directed his trustees to divide his residuary estate into thirty-five shares and to hold such shares in the proportions therein specified upon trust for his five named children. He directed his trustees to retain the shares of four of his children and hold the same upon trust for them for their respective lives and then for their issue. In the case of a daughter dying without issue, her share was to be held in trust for any husband who might survive her. By cl. 16 it was provided that in case any child of the testator should not have a child who attained a vested interest in the share of such child " such child's share and any additional share or shares . . . . which may accrue " or be added thereto . . . . shall go and accrue to such of my " children as shall be living at the death of such child . . . . and " so that the share which shall accrue to any child of mine . . . . " shall be held upon the trusts and subject to the powers and pro- " visions herein declared and contained concerning his or her " original share." The testator's five children survived him. All died without having had issue who attained a vested interest in their respective shares. The testator's last surviving child, a daughter, died a widow in 1945. At her death she was in receipt of the income of her own share and the income of two-thirds of the share of a son of the testator and the whole income of the share of a daughter, which were payable to her under the accruer provisions. The question was raised whether the accruing shares formed part of the estate of the last surviving daughter or formed part of the estate of the children whose shares they originally were :—

Held, that the will contained two clauses, which on their true construction, amounted to absolute gifts in favour of a beneficiary with trusts engrafted on them. On the true construction of cl. 16 the accruing shares were in the first instance given absolutely to the child to whom they accrued, with a subsequent engrafting of trusts. The rule in *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551, applied to cl. 16 and, accordingly, the accrued shares formed part of the estate of the last surviving child.

APPEAL from the Palatine Court of Lancaster.

By his will, dated September 28, 1906, George Litt gave his residuary estate to his trustees upon the usual trusts for sale and conversion. By cl. 8 he directed his trustees to divide his net residuary estate into thirty-five equal parts and to hold such thirty-five equal parts as to eight thereof in trust for his son John Graves Litt, as to another eight thereof in trust for

[Reported by MISS B. A. BICKNELL, Barrister-at-law.]

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his son Henry Villiers Litt, as to another eight thereof in trust for his daughter Mrs. Harding, as to another three thereof in trust for his daughter Mrs. St. George and as to the remaining eight thereof in trust for his daughter Nina Litt, who became Mrs. Hedley. By cl. 9 it was declared that if any child of the testator should die in his lifetime leaving issue, such issue should take by substitution the share which the deceased child would have taken. By cl. 10 the testator provided that the share of the trust fund given to each child of his, other than Henry Villiers Litt, should not vest absolutely in such child but should be retained by his trustees upon the trusts thereinafter declared. By cls. 11 to 14 the testator directed his trustees to invest such share and during the life of such child to pay the income of his or her share to him or her and after such child's death the share was to be held on trust for such child's issue as therein provided. By cl. 15 he declared that in the case any daughter of his should not have a child who should attain a vested interest in her share, such share should be held in trust for any husband who might survive her. Clause 16 provided as follows : " And I declare that in case any child of mine shall " not have any child who under the trust in default of appoint- " ment hereinbefore contained attains a vested interest in the " share of such child of mine and in case of any daughter of " mine not leaving any husband her surviving who shall be " living at the time of such failure of such daughter's issue " then subject to the trusts powers and provisions herein " declared and contained concerning the same share and to " every or any exercise of any such powers such child's share " and any additional share or shares in the trust fund or " otherwise which may accrue or be added thereto by virtue " of this present proviso and the income thereof shall go and " accrue to such of my children as shall be living at the death " of such child of mine and to the children or child then living " of any then deceased child of mine and if more than one in " equal shares but so that the children of any then deceased " child of mine shall take equally between them under this " clause the share only which their parent would have taken if " he or she had then been living and so that the share which " shall accrue to any child of mine other than the said Henry " Villiers Litt shall be held upon the trusts and subject to the " powers and provisions herein declared and contained con- " cerning his or her original share or as near thereto as circum- " stances will admit."

The testator died on December 23, 1907. He was survived by the five children named in his will, all of whom died without having had issue who attained a vested interest in their respective shares. Henry Villiers Litt died on November 20, 1921, John Graves Litt died on June 5, 1931, Mrs. Harding died on June 16, 1931, leaving her husband her surviving, Mrs. St. George died on November 1, 1932, a widow, and Mrs. Hedley died on May 21, 1945, a widow. At her death, Mrs. Hedley was in receipt of the income from her own original eight-thirtieths share. She was also in receipt of the income from two-thirds of the eight thirty-fifths share originally settled on John Graves Litt, which two-thirds on his death had accrued in equal shares to Mrs. St. George and Mrs. Hedley. She was also in receipt of the income of the three thirty-fifths share originally settled on Mrs. St. George.

This petition was presented by William Henry Parry, as plaintiff, one of the trustees of the testator's will asking whether on Mrs. Hedley's death the whole of the trust fund belonged to her estate or whether such fund, so far as it represented two-thirds of the eight thirty-fifths share settled on John Graves Litt belonged to his estate and, so far as it represented the three-thirtieths share settled on Mrs. St. George, belonged to her estate. The plaintiff was also the personal representative of John Graves Litt. The defendants to the application were Percy Singleton Cooper, the executor of Mrs. St. George, and Reginald West Fovargue the executor of Mrs. Hedley.

Bennett V.-C., held that the rule in *Lassence* v. *Tierney* (1) applied to cl. 8 of the will, with the result that the shares accruing from John Graves Litt and Mrs. St. George belonged to their respective estates. The executor of Mrs. Hedley appealed.

Jenkins K.C. and *Lyon Blease* for the appellant. The question turns on the effect of the gift in cl. 16. The effect of that clause is to consolidate original and accrued shares. There is an absolute gift of the accrued shares in that clause and the rule in *Lassence* v. *Tierney* (1) applies to that clause as well as the original gift in cl. 8. He referred to *Hancock* v. *Watson* (2), *In re Payne* (3), and *In Re Marshall* (4).

Neville Gray K.C. and *G. Maddocks* for Percy Singleton Cooper, the executor of Mrs. St. George. The rule in *Lassence* v.

(1) (1849) 1 Mac. & G. 551.
(2) [1902] A. C. 14.
(3) [1927] 2 Ch. 1.
(4) [1928] 1 Ch. 661.

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Tierney (1) will not be applied twice in the same will. The rule plainly applies to the original gift and, the subsequent trusts having failed, that gift takes effect.

E. Ackroyd for the plaintiff.

LORD GREENE M.R. This appeal raises a short question of construction of the will of the late Mr. George Litt, who died on December 23, 1907. The question relates to the rule which is often inaccurately called the rule in *Lassence* v. *Tierney* (1), and the question raised by the appeal relates to the application of that rule to an accruer clause. I must confess that I am surprised to find that a question of this kind has not appeared anywhere in the books, because accruer clauses are very common, and one would have thought that similar questions would have arisen on other wills. However, we have no assistance from earlier cases in that respect.

His lordship stated the facts and continued: The question raised in this appeal relates to those accruing interests which Mrs. Hedley enjoyed. There is no question that with regard to her original share, she having left no children and there being nobody to take under the accruer clause, it remained vested in her under the rule in *Lassence* v. *Tierney* (1). What is said is that these accruing shares, accruing directly or indirectly to her, do not vest in her legal personal representative, but remain subject to the original absolute gift contained in the earlier part of the will in favour of the child whose original share they represent; in other words, that those accruing shares (I will not pause to specify the exact figures) go back, as to part to the estate of John Graves Litt, whose legal personal representative is before us, and in part to Mrs. St. George's estate, whose legal personal representative is also before us.

It is argued, on the other hand, that the learned Vice-Chancellor, who accepted the argument I have just mentioned, was wrong, and that under cl. 16 itself the *Lassence* v. *Tierney* (1) rule falls to be applied, by reason of the fact that the gift of accruing shares is a gift which is itself, in the first instance, an absolute gift to the child to whom those accruing shares accrue, and that that absolute gift in its turn has engrafted upon it a trust in favour of the children of the child which has failed, and, therefore, the absolute gift remains. In other words, it is said that when the trusts engrafted on the original shares of the child are examined, it is found that one of the trusts consists of a direction for accruer, and that the direction for accruer itself creates an absolute interest, in the first instance in favour of the person to whom the share accrues, and that on that absolute interest trusts are engrafted which have failed, and, accordingly, that absolute interest remains.

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(1) 1 Mac. & G. 551.

It is pointed out that the case is rather an unusual one, in that in two different places in the will, if the appellant is right, there will be found expressed in different language what I may call two *Lassence* v. *Tierney* (1) clauses, that is to say, clauses which on their true construction amount to absolute gifts in favour of a beneficiary, with trusts engrafted upon them. It is suggested that to find such a thing is unusual, and, therefore, we should not construe the language so as to produce that result. I do not myself feel that difficulty. I can see no logical reason why a trust engrafted upon an absolute interest should not, among the trusts which are so engrafted, include a further absolute interest, which in its turn is subject to settlement. If that be the true construction, the rule in *Lassence* v. *Tierney* (1), in my opinion, will apply at that stage.

The whole controversy here, as always in these cases, turns on the question whether, on the true construction of cl. 16, the accruing shares are to be read as given, in the first instance, absolutely to the child to whom they accrue, with a subsequent engrafting of trusts in favour of that child's children, or whether the only gift in favour of the child to whom a share accrues is to be found in the trusts by which the accruing share is settled. In my opinion, the rule in *Lassence* v. *Tierney* (1) does apply to cl. 16. Nobody can pretend that the case is free from difficulty, but I have formed a clear conclusion as to the way in which it should be decided.

I must now look at cl. 16 and analyse some of its language. With regard to the direction for accruer, after providing for the case of default by reason of which the accruer is to take effect, the testator says " such child's share and any additional share " or shares in the trust fund or otherwise which may accrue " or be added thereto by virtue of this present proviso and the " income thereof shall go and accrue to such of my children as " shall be living at the death of such child of mine." Pausing there for a moment, the language used appears to me to be perfectly apt to express an absolute gift. The direction is not that the accruing share is to accrue to the original share, but is to accrue to the then living children. It is in terms the share and the income thereof. The testator therefore is disposing, not merely of income in favour of the surviving children, but also of capital.

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(1) 1 Mac. & G. 551.

The next clause is a substitutional clause. It says: "and "to the children or child then living of any then deceased "child of mine and if more than one in equal shares." That really is analogous to or corresponds with, although not in terms the same as, the original substitutional cl. 10 in respect of the original gift under cl. 8. It goes on as follows: "but "so that the children of any then deceased child of mine shall "take equally between them under this clause the share only "which their parent would have taken if he or she had been "then living." In those words I find a strong indication that the accruing share is intended to be given, in the first instance, absolutely to the child to whom it accrues, for this reason: the interest to which the children of a then deceased child are substituted is expressed to be the share which their parent would have taken if then living. If, on the true construction of this clause, the provisions for accruer are to be read as merely a trust for the surviving children for their respective lives with a remainder to their children, that is to say, if it is to be read as though there is no gift to a child to whom a share accrues other than is to be found in the trusts relating to the share and settling it, then all that the child would take would be the income of a share. It would never have any interest in the capital of a share. Nevertheless, the testator in this substitutional clause speaks of the share which the parent would have taken. If *Lassence* v. *Tierney* (1) does not apply, the accurate language to have used would have been, I think, not the share which the parent would have taken, but the share, the income of which the parent would have taken, because ex hypothesi the parent never would have taken any share in the capital.

The clause then goes on: "and so that the share which shall "accrue to any child of mine other than the said Henry Villiers "Litt shall be held upon the trusts and subject to the powers "and provisions herein declared and contained concerning his "or her original share or as near thereto as circumstances will "admit." It is to be observed that if the *Lassence* v. *Tierney* (1) rule applies, those are the trusts engrafted on the accrued share. If the rule does not apply, then those are the trusts which affect the share in such a way as not to cut down an original absolute interest, but to make it clear that no such interest was intended, and that the child to whom the share was accruing was only intended to have the life interest. In point of position in the clause, they come after the paragraph which I have just been discussing, the substitutional clause which refers to the share which the parent would have taken.

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(1) 1 Mac. & G. 551.

In this very provision itself there is another indication, I think, that the view which I am expressing is the right one. It is this: Henry Villiers Litt took his original share absolutely, it was not settled under the original gift. Therefore he had naturally to be excluded from these directions for settlement. But it is to be observed that his share is referred to, and the share of the other children is referred to, by precisely the same phrase, namely, " the share which shall accrue to any child of " mine." In the case of Henry Villiers Litt, the accruing share was unquestionably a share in capital, which he took absolutely, and exactly the same language is used to describe the share which goes to other children, which, it is said, is not an absolute gift at all.

Taking all those matters into consideration, and giving the best construction that I can to this clause, I am of opinion that the decision of the learned Vice-Chancellor was wrong, and that the rule in *Lassence* v. *Tierney* (1) applies to the accrued shares, which accordingly go to the estate of Mrs. Hedley and not to the estates of her brother and sister.

MORTON L.J. The decision of this appeal turns upon the construction of cl. 16 of the testator's will, although, of course, that clause must be read with due regard to the will as a whole in which it occurs. It seems to me that the opening words of cl. 16 which refer to " such child's share and any additional " share or shares in the trust fund or otherwise which may " accrue or be added thereto by virtue of this present proviso " and the income thereof " were clearly dealing with capital as well as income. That could not be disputed. Then the clause continues: "shall go and accrue to such of my children " as shall be living at the death of such child of mine and to " the children or child then living of any then deceased child " of mine and if more than one in equal shares." Pausing at that point, there could not be, I apprehend, the slightest doubt that that is an absolute gift to the children living at the death of the child in question, and to the children or child then living of a deceased child of the testator, both children and grand-

(1) 1 Mac. & G. 551.

children taking absolutely. If the clause had stopped there, I apprehend that the division would probably have been per capita. Then comes what I may call the first qualifying clause, which is in the following terms " but so that children of any " then deceased child of mine shall take equally between them " under this clause the share only which their parent would " have taken if he or she had been then living." That has the effect of making the division clearly a stirpital division, and, as my Lord has said, the reference to the share which their parents would have taken fortifies the conclusion (which one would have come to, I think, at first sight without these words) that the gift so far is an absolute one. Then the clause proceeds " and so that the share which shall accrue to any child of mine " other than the said Henry Villiers Litt shall be held upon the " trusts and subject to the powers and provisions herein " declared and contained concerning his or her original share " or as near thereto as circumstances will admit." There again that second qualifying clause supports the view that there is an absolute original gift. Henry Villiers Litt takes absolutely, not because of anything which follows subsequently, but because he is excluded from the engrafted trusts which are put upon the shares of the other children.

Regarding this clause by itself, I should not have felt any doubt that it is precisely the sort of clause which is referred to in *Hancock* v. *Watson* (1). There is, as I see it, an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed upon that absolute gift. The words " but so that," and the words " and so that " seem to me quite indistinguishable from such words as " provided always that " and " and provided further that." They are suitable words to introduce the engrafting of trusts upon a gift which is in terms absolute. The only reason of any force which I think could be advanced for giving them some other meaning in this particular will is that cl. 16 is part of the trusts engrafted upon the original gift to the testator's five children. That is quite true, but for my part I can see no reason why the engrafted trusts should not contain another trust of the kind which is generally referred to as a *Lassence* v. *Tierney* (2) trust, and I think that the engrafted trusts in the present case do contain such a trust.

If I may take, for example, the share of John Graves Litt and trace it through shortly: when John Graves Litt died one-third of his eight thirty-fifths of the residue went to Mrs. Hard-

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(1) [1902] A. C. 14.

(2) 1 Mac. & G. 551.

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ing for life, and I need not say more about that because, as Mrs. Harding left a husband her surviving, this share passed to him. Then in the case of Mrs. St. George, there was, as I read cl. 16, an absolute gift to her, in the first instance, but the gift of accrued shares from John Graves Litt was cut down by the words which follow. It was undoubtedly cut down, and the one-third of John Graves Litt's eight thirty-fifths, which passed to Mrs. St. George, passed on to Mrs. Hedley. In my view, that fraction, whose career I have been tracing, came to rest finally at the point to which it was taken by these trusts. It came to Mrs. Hedley absolutely under cl. 16. Trusts were engrafted upon that absolute interest which failed, because Mrs. Hedey died a widow without ever having had a child, and that fraction of the estate of the testator remained at home in Mrs. Hedley's estate.

It is certainly strange that no case appears to have been reported of a similar kind to the present case, but I can arrive at no other conclusion but that cl. 16 is a *Lassence* v. *Tierney* (1) clause, just as much as is cl. 8 with the engrafted trusts set out in cl. 10. The result must be, in my view, that this appeal must succeed and an appropriate declaration must be made.

BUCKNILL L.J. I agree.

Appeal allowed.

Solicitors: *Simpson, North, Harley & Co. for Raper & Fovargue, Battle, Sussex; Layton & Co. for Layton & Co., Liverpool; Duncan, Oakshott, Morris-Jones & Holden, Liverpool.*

(1) 1 Mac. & G. 551.

UTHWATT J.
1945
Nov. 26;
Dec. 3, 10.
1946
Jan. 30.

In re GREYCAINE, LIMITED.

Company—Debentures—Receiver for debenture holders—Agreed remuneration—Compulsory winding-up—Order by registrar fixing remuneration on application of liquidator—Motion by receivers to discharge order—Jurisdiction—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 309.

By s. 309 of the Companies Act, 1929: "The court may, on an "application . . . . by the liquidator of a company, fix the "amount to be paid by way of remuneration to any person who, "under the powers contained in any instrument, has been appointed "as receiver . . . . of the company. . . ."

A trustee for debenture holders appointed two receivers and authorized them to retain a commission of a specified amount by way of remuneration. Later, the company was compulsorily wound up. The amount of the receivers' remuneration was very great and the registrar, on the liquidator's application under s. 309, fixed it at a smaller amount. In fixing it, he intended to apply a scale in which receipts were taken into account, and he made a slip in working out the scale that he had in mind. One of the receivers had died before the liquidator's application to the registrar, and his personal representatives and the surviving receiver moved to discharge the order:—

Held, (1.) that s. 309 applies only where a receiver had been appointed and that the word "fix" in the section means "fix" whether the remuneration has or has not been agreed and that, under the section, the liquidator has rights which are denied to the company just as the liquidator and creditors have, under s. 79, rights which override the company's bargain; (2.) that the jurisdiction of the court under the section can be exercised only with respect to the future.

The court expressed no opinion on the question whether the words "amount to be paid by way of remuneration" meant remuneration to be paid in the future, whenever the services were rendered, or remuneration to be paid for future services.

Order discharged, and matter remitted to registrar, with direction that any order made by him was not to relate to remuneration which, pursuant to the terms of the debenture trust deed and the instrument appointing the receivers, had accrued payable to the receivers before the date of the liquidator's application.

MOTIONS.

Two debenture trust deeds, pursuant to which two joint receivers for debenture holders of the company were appointed, provided that the remuneration of any receiver appointed should be at the rate determined by the trustee for the debenture holders, not exceeding that provided by s. 109 of the Law of Property Act, 1925, (namely, such rate, not exceeding five per cent. on the gross amount of all moneys received, as should be specified in his appointment). The trustee authorized the receivers to retain, out of the mortgaged premises and/or the moneys to be received by them, for their remuneration a commission of 5 per cent. of the gross amount of all moneys received by them. In 1938 it was ordered that the company be wound up. In 1944, one receiver died. The specified amount of 5 per cent. worked out at a very large sum and, by a summons taken out in May, 1945, under s. 309 of the Companies Act, 1929, the liquidator asked the court to fix the receivers' remuneration. In October, 1945, the registrar ordered that " . . . . . .

"the remuneration of [the surviving receiver] and [the deceased "receiver] as such receivers as aforesaid be and the same is "hereby allowed at £15,000." The personal representatives of the deceased receiver, and the surviving receiver, now moved to discharge that order. The order was intended to determine the total remuneration of the receivers for a period from the beginning of the receivership. The registrar informed the court that he had intended to apply a scale in which receipts were taken into account and that he had made a slip in working out the scale that he had in mind. All parties wished to have decided the questions of construction of s. 309, whether the court had any jurisdiction when a receiver had been appointed at an agreed remuneration, and whether an order could cover the past or could deal only with the future.

Roxburgh K.C. and *Cecil Turner* for the personal representatives of the deceased receiver. Under s. 309 the court " may " fix the remuneration of a receiver. It is not bound to fix it, but will do so purely within its discretion : and if it does, the order will apply only to remuneration paid as from the date of the order. The court can neither review nor reduce remuneration which has already been paid. In the present case, the debenture trust deed definitely fixed the remuneration. A debenture trust deed is a mortgage deed and, to disturb the bargain that has been made, the court would have to hold that s. 309 of the Companies Act, 1929, has impliedly repealed s. 109 of the Law of Property Act, 1925, see, also, ss. 101 to 103 of the Law of Property Act, 1925. The court will not imply that one statute has repealed another unless there is a necessary implication. If there is not, there must be express words of repeal : see Maxwell on the Interpretation of Statutes, 8th ed., p. 151. The fixing of the remuneration by the debenture trust deed and the instrument appointing the receivers constituted a bargain between the parties which the court has not jurisdiction to review. Also, the compulsory winding up of the company does not operate to set aside the remuneration of a receiver appointed by a trustee for debenture holders. For these reasons the registrar's order ought to be discharged.

Roxburgh K.C. and *Brunyate*, for the surviving receiver, adopted the last argument and referred to *In re Vimbos, Ld.* (1). Also, the jurisdiction of the court under s. 309 is exercisable only with reference to remuneration payable after the date of

(1) [1900] 1 Ch. 470.

the order which the court makes. That must be implied by the words "to be paid." The effect of those words must be that the jurisdiction cannot extend to remuneration that has already been paid.

Wynn-Parry K.C. and *V. R. Aronson* for the liquidator. The court has not exceeded its jurisdiction in the present case. The amount of the remuneration can be fixed irrespective of whether it has or has not been agreed between the parties. Also, the whole of it can be fixed, both that which has been already received and that which is to come. The section gives to the court, in effect, power to review past payments of remuneration as well as to decide what shall be paid in future to a receiver.

Cur. adv. vult.

1946. Jan. 30. LORD UTHWATT, delivering a written judgment, said: The order is obviously unsatisfactory in form, but it is common ground that it was intended to operate as an order determining the total remuneration properly payable to the receivers in respect of the period beginning with the commencement of the receivership until a recent date. The registrar has informed the court that he intended to apply a scale in which receipts were taken into account and, presumably the period covered ends with the date of the last receipt taken into computation. To this there must be added that the registrar informed the court that he has made a slip in working out the scale he had in mind.

In these circumstances, the normal course would be to discharge the order and remit the matter back for reconsideration by the registrar without further ado; but the parties desire to have decided by the court two questions of construction of the section which were raised before the registrar. The first question is whether the court has any jurisdiction at all where a receiver has been appointed at an agreed remuneration; the second is whether an order can be made which covers the past, or whether only the future can be dealt with. I propose to deal with these questions so far as raised by the facts of this particular case. I propose to assume that the receivers were duly appointed and that some remuneration was duly allotted to the receivers on a percentage basis applicable to receipts as they come in. I observe only in passing that, in the trust deeds the amount to which the percentage was to be applied was left to inference and that in the appointment, contrary to the provisions of the Law of Property Act, 1925, the receivers were to be entitled to expenses as well as commission.

In considering the section, there are various matters which should be borne in mind. The first is that, under the Law of Property Act, 1925, there is, subject to any contrary intention expressed in a mortgage deed, given to a mortgagee of any property power to appoint a receiver of the income of the mortgaged property (and in certain exceptional cases, where the property is of the nature of income, a receiver of the property itself)—the power being capable of extension or variation—and a consequential provision as to the remuneration of a receiver so appointed. Save in rare cases, securities given by a company registered under the Companies Acts fall within the term " mortgage deed " as defined in the Act of 1925. Second, in the case of trust deeds securing debentures or debenture stock and in the case of debentures not supported by a trust deed, it is and has for many years been the common practice to give to the trustees in the first case and to a debenture holder in the latter case power to appoint a receiver of the mortgaged property itself. The practice has been to deal with the receiver's remuneration in terms. In the case of trust deeds, the usual provision was and is that the trustees may fix his remuneration, subject in certain cases to a limitation. In the case of debentures the provisions of the Law of Property Act, 1925, or its predecessor, the Conveyancing Act, 1881, were and are incorporated, with certain variations. The common method of fixing remuneration is by reference to a percentage based on the value of receipts from transactions into which the receiver from time to time enters and, so far as I am aware, the commercial practice is that the amount or scale of remuneration is agreed when the receiver is appointed. Powers wider than those implied by the Acts—for instance, powers of sale or carrying on a business—were and are usually given to receivers appointed under a debenture and where there is a trust deed the practice has been either to give these powers to the receiver or to enable the trustees to delegate to him all or any of the powers and discretions as to sale and otherwise give to the trustees under the terms of the deed.

The result is not satisfactory. In any negotiation as to the terms of a security, the question of the receiver's remuneration is hardly likely to be discussed at all. Common form is adopted. The effect of the application of statutory provisions, designed to deal with the case where the receiver is receiver of income only,

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to a case where the receiver may also deal with the corpus is not a matter which the persons concerned are likely to have in mind. Again, it would be difficult, perhaps impossible, to upset an exercise in good faith by the trustees of their power to fix remuneration. Lastly, remuneration assessed by reference to the value of transactions may or may not work fairly. Logically, the value of the property dealt with is irrelevant (though in practice one may be driven to it) if the end sought to be achieved is fair reward for skill and labour.

One further matter may be mentioned. One usually finds, where debentures are outstanding, that the appointment of a receiver precedes the commencement of a winding-up. It is, I think, legitimate to approach the construction of the section with these considerations in mind.

As regards the first question, I have no doubt. The section applies only where a receiver has been appointed and, normally, his remuneration will have been expressly agreed. To hold that the section applied only where there was no effective agreement as to remuneration would be to disregard entirely the position which required to be dealt with and to reduce the ambit of the section to a microscopic quantity. That microscopic quantity was ascertained in this way: " Fix " means make certain what is not certain. There may be cases where there is no provision in operation. The receiver in such a case is entitled to be remunerated on a quantum meruit basis; and the function of the section is to give the court, in its winding-up jurisdiction, power to fix the amount in fact payable. This argument disregards reality. The grammatical meaning is clear; and no absurdity or departure from the intent of the legislation as appearing in the section is involved in adhering to it. " Fix " means fix, operative agreement or not. Just as under s. 79 of the Companies Act, 1929, the liquidator and creditors have rights which override the company's bargain, so, under this section, the liquidator has rights denied to the company.

There is more substance in the second point raised. It was argued that, as the discretion given to the court was a judicial discretion, there was no reason why the section should not be widely construed. The court would be bound to take into account all the circumstances, including in particular the fact that services had been rendered on the basis of a bargain duly made, and the further fact, if it were the fact, that the agreed remuneration referable to those services had been duly satisfied.

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No injustice would raise. This may be true, but it is not an argument directed to the construction of the section. In my opinion, the jurisdiction can be exercised only as respects the future. The jurisdiction is not to fix the amount payable, but the amount " to be paid," and these words point to regulating the course of events in the future, not to the possibility of reviewing the past. The section, to my mind, is directed to enabling the court, on the application of the liquidator, to regulate the course of business as regards a receiver's remuneration once a winding-up has begun and not to enabling the court, when a winding-up has begun, to re-open matters that have before an application under the section, been duly carried out. It is not necessary, for the purposes of the particular case before me, to define the construction more closely. The parties here are not concerned with the question whether " remuneration to be paid " means remuneration to be paid in the future, whenever the services were rendered, or remuneration to be paid as respects future services. I propose to express no opinion on that point. Nor, again, are they concerned with the question whether what I have called the future means the date of the application or the date of the order but it is in my view clear that the date of the application is the material date.

Whether I am right or wrong in my construction of the section, the order, in view of the registrar's slip, must be discharged. With a view to enabling the matter to be effectively considered by the Court of Appeal, I propose to remit it to the registrar with a direction that any order made by him is not to relate to remuneration which, pursuant to the debenture trust deed and to the instruments appointing the receivers, has accrued payable to the receivers before the date of the liquidator's application. I understand that that direction is against the common practice which has been followed in Companies Winding-up since s. 309 has been in force. It is desirable that the practice should be settled once and for all, and I will give the liquidator leave to appeal.

The costs of all parties will be taxed as between solicitor and client and retained out of the assets.

Solicitors: *Roney & Co.; F. G. Hampshire; Cosmo, Cran & Co.*

K. R. A. H.

HIVAC LIMITED *v.* PARK ROYAL SCIENTIFIC INSTRUMENTS LIMITED AND OTHERS.

C. A.
1946
Feb. 4, 5.
Lord Greene M.R., Morton and Bucknill L.JJ.

Master and Servant—Skilled worker—Employment in spare time by trade rival of employer on similar work—Duty to employer—Interlocutory injunction.

The plaintiff company employed the defendants R. D. and G. D. on highly skilled work, in which R. D. at least had access to all the plaintiffs' manufacturing data. In their spare time R. D. and G. D. worked for the defendant company on similar work which was in direct competition with that of the plaintiff company, and they also persuaded others of the plaintiff company's employees to work for the defendant company in their spare time; but there was no evidence that these employees had access to, or divulged to the defendants, confidential information:—

Held, that the extent of the duty of fidelity owed to an employer by an employee may vary according to the nature of the employment, but while the court would be reluctant to impose on workers restrictions which would hamper them in increasing their earnings in their spare time, in the present case the employees had knowingly, deliberately and secretly set themselves to do in their spare time something which would inflict great harm on their employers' business; and that the plaintiff company were entitled to an interlocutory injunction to restrain the employment by the defendant company of the plaintiff company's employees.

APPEAL from Cohen J.

The plaintiff company Hivac, Ld., were manufacturers of midget valves for deaf aids; during the war their valves were also used for a number of war purposes, and their output was approximately 25,000 valves a month. The work of making and assembling the valves was highly skilled. The defendant Raymond Davis was employed by the plaintiff company from May, 1941, as a production engineer, and his wife, Mrs. Gladys Davis, was also employed by the plaintiff company with whom she had been a forewoman for the last six years in charge of the valve assembly department with a staff of eighty girls under her. As production engineer Raymond Davis had access to all the plaintiff company's manufacturing data relating to midget valves.

The defendant company Park Royal Scientific Instruments, Ld. was incorporated in April, 1944, with a capital of 1,000*l.*, fully paid up, and the defendants Leslie Smith and Frank Bernhart were directors of the defendant company. Mrs. Gladys Davis, having secured her discharge under the Essential Work

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Order from the plaintiffs' employment on the ground of ill-health, was employed part-time by the defendant company when she was well enough to work. Shortly before the writ in the action was issued, on December 4, 1945, it came to the knowledge of the plaintiff company that the defendant company were manufacturing midget valves. Before that time the plaintiff company thought they had a monopoly. The manager of the plaintiff company, Mr. Diggle, made inquiries of the defendant company on the telephone, and spoke to the defendant Smith, who admitted that the defendant company were manufacturing valves for hearing aids. Asked where he had obtained his knowledge of the business he said that the defendant company had an Austrian working for them who had assisted them in the development of the valves. He did not mention that he had any present or past employee of the plaintiff company working for him. In fact, the defendant Raymond Davis had been for some time co-operating with the defendant Smith in designing, preparing, and obtaining the necessary equipment for the production of, a complete hearing aid including midget valves. He had designed for the defendant company two new types of midget valve, but he incorporated all the improvements also in the valves made by him for the plaintiff company. The two Davises, in addition to working themselves for the defendant company in their spare time, had also invited a number of other employees of the plaintiff company to work for the defendants, some of whom had done so for varying periods, receiving at least their expenses. These employees were not made parties to the action.

When further inquiries revealed these facts to the managing director of the plaintiff company, the defendant Raymond Davis was dismissed and the writ was issued, and the plaintiffs moved for an interlocutory injunction " that the defendants " and each of them and their agents may be restrained until " judgment in this action or until further order from employing " or procuring to be employed in the service of the defendants " or any of them any servant or employee of the plaintiff " company of any of the categories specified in the schedule to " this order whilst still in the service or employment of the " plaintiff company or in any other manner so as to cause " such servant or employee to commit a breach of his contract of " employment or service with the plaintiff company or of the " duty owed to the plaintiff company." Cohen J. held that in the absence of express stipulation in their contracts of employment as to the use of their spare time he could not restrain the plaintiff company's employees from working in their spare time for a trade rival, unless it were shown that they were in possession of confidential information. He made no order on the motion, except that the costs should be costs in the action. The plaintiff company appealed.

Clark K.C. and *Dunbar* for the plaintiff company. Cohen J. was wrong in law, in that it would be a breach of the duty of fidelity owed to the plaintiffs for their employees to work for a direct competitor to the detriment of the plaintiffs' business, even in their spare time. The duty is stated in Addison on Contract, 10th ed., 861 : " A servant in the service of a tradesman impliedly promises to do no act knowingly and wilfully which may injure his master's trade." *Nichol* v. *Martyn* (1) has been disapproved as being too lenient to the servant. *Wessex Dairies, Ld.* v. *Smith* (2) which extends *Robb* v. *Green* (3) is a clear exposition of the law as it stands to-day, but it does not deal with the question of what a man may do in his spare time. If the servant commits a breach of the fiduciary duty, it is submitted that it is wholly immaterial whether it is done in his own time or his master's, so long as the contract of service still subsists. The question is always not whether the acts were done in time paid for by the master, but whether they were a breach of the trust reposed in the servant by the master.

Upjohn K.C. and *Lindner* for defendants. These are skilled manual workers carrying out processes which are perfectly well known. No one doubts that a servant must be faithful to his master, but the plaintiffs' claim is that the servants may not do anything which might tend to the damage of the master's business. In the absence of any clause expressly binding them to work exclusively for the master, that cannot be implied.

The action is not properly constituted in the absence of the workmen, into whose contracts of service a most material term is sought to be implied in their absence. To grant an injunction in this case would be virtually granting specific performance of a contract of service. An injunction, moreover, would serve no useful purpose at the present time, for if there is this implied term in the contracts of service, the breach of it would clearly

(1) (1799) 2 Esp. 732.
(2) [1935] 2 K. B. 80.
(3) [1895] 2 Q. B. 315.

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entitle the plaintiffs to dismiss the offenders on the ground of "serious misconduct" notwithstanding the Essential Work Order. In any case, it is not a case for an interlocutory order of any sort. Very difficult questions are raised by the plaintiffs' writ, which are not material on this motion; it would not be right to make an order which would hamper the defendant company's output, until the precise nature of the processes in which they are engaged is ascertained by evidence in the action. No harm will be done by refusing an injunction at this stage, for if the plaintiffs are entitled to any relief, damages will be a sufficient remedy.

Clark K.C. replied.

Lord Greene M.R., having stated the facts, said: The defendants secretly procured five employees of the plaintiffs to come and work for them, and to put at their disposal their skill and experience for the purpose of enabling the defendant company to get its business going and to become successful in their particular field. The defendants and the employees on the evidence appear quite clearly to have known exactly what they were doing, and they knew that, at any rate, it was morally reprehensible, if not legally wrong. If they had not known that it was wrong, it is not conceivable that they would not have told the plaintiffs. The actual time which these employees were bound by their contract to give to the plaintiffs appears to have been the normal five and half days a week. There are provisions in the Essential Work Order by which, in certain circumstances, and provided certain conditions are complied with, employees who fall under that order can be compelled to work overtime, but nothing of that sort comes into question here. The time in which these employees were working for the defendant company was unquestionably what may be described as their own spare time. The question we have to decide for the purpose of this interlocutory appeal is whether or not the five employees were committing a breach of their obligation to their employers in using their spare time for the purpose of assisting a company which they must have known was either in competition, or proposing to enter into competition, with their employers; and, if so, whether the defendants procured that breach.

A question of this kind in normal times would not have been likely to arise, for the very simple reason that these employees could have been got rid of on twenty-four hours' notice, and no doubt there were skilled people who could have been obtained to take their place. It may very well be that this class of question has never arisen in the past because there was no practical reason why it should. But now, in present conditions, the question has arisen, and we have to consider on the facts before us whether or not a question of importance and difficulty is raised, and what prima facie view the court takes of it, and whether, in the circumstances, we ought to grant an interlocutory injunction.

There is one matter which I think I can dispose of at once. It is argued on behalf of the plaintiffs that on the evidence what may be called confidential information must have been disclosed or utilized by these five employees for the benefit of the defendant company. The learned judge took the view that no such case had been made out. I do not differ from that view. It seems to me that confidential information has not down to the present, at any rate, been made use of by these five employees, if, indeed, they were in possession of any such information. When one gets into the area of confidential information the law is fortunately much more certain, but once that particular element is excluded, we are in an area which has not, as I have said, been sufficiently explored.

The argument on behalf of the plaintiffs with regard to confidential information was also to the effect that, even assuming no confidential information has as yet been disclosed, and assuming there is no threat to disclose it or use it for the benefit of the defendants, it will, nevertheless, be inevitable, if those employees continue to work for the defendants, that they will put at the disposal of the defendants any confidential information which, in the course of their work for the plaintiffs, they may obtain. It is said with force that employees engaged in this particular work are bound to become acquainted with any improvements or any experiments which the plaintiffs may make in the course of their business in relation to these midget valves, because they would be given the task of constructing or assembling valves for the purpose of incorporating such improvements, and so forth. That is, I think, a matter which the court cannot ignore. After all, one has to be practical in these matters, and one has to consider what the practical result will be, and it may very well be said that to say that people in these circumstances can, so to speak, make a division in their minds between what is confidential and what is not, and be quite careful while they are working for the defendants to keep

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the confidential information locked up in some secret compartment of their minds theoretically may be all very well, but from the practical point of view has a certain unreality.

It has been said on many occasions that an employee owes a duty of fidelity to his employer. As a general proposition that is indisputable. The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends. Prima facie it seems to me on considering the authorities and the arguments that it must be a question on the facts of each particular case. I can very well understand that the obligation of fidelity, which is an implied term of the contract, may extend very much further in the case of one class of employee than it does in others. For instance, when you are dealing, as we are dealing here, with mere manual workers whose job is to work five and a half days for their employer at a specific type of work and stop their work when the hour strikes, the obligation of fidelity may be one the operation of which will have a comparatively limited scope. The law would, I think, be jealous of attempting to impose on a manual worker restrictions, the real effect of which would be to prevent him utilizing his spare time. He is paid for five and a half days in the week. The rest of the week is his own, and to impose upon a man, in relation to the rest of the week, some kind of obligation which really would unreasonably tie his hands and prevent him adding to his weekly money during that time would, I think, be very undesirable. On the other hand, if one has employees of a different character, one may very well find that the obligation is of a different nature. A manual worker might say: " You pay me for five and a half days work. " I do five and a half days work for you. What greater " obligation have I taken upon myself? If you want in some " way to limit my activities during the other day and a half " of the week, you must pay me for it." In many cases that may be a very good answer. In other cases it may not be a good answer because the very nature of the work may be such as to make it quite clear that the duties of the employee to his employer cannot properly be performed if in his spare time the employee engages in certain classes of activity. One example was discussed in argument, that of a solicitor's clerk who on Sundays it was assumed went and worked for another firm in the same town. He might find himself embarrassed because the very client for whom he had done work while working for the other firm on the Sunday might be a client against whom clients of his main employer were conducting litigation, or something of that kind. Obviously in a case of that kind, by working for another firm he is in effect, or may be, disabling himself from performing his duties to his real employer and placing himself in an embarrassing position. I can well understand it being said: "That is a breach of the duty of fidelity "to your employer because as a result of what you have done "you have disabled yourself from giving to your employer that "undivided attention to his business which it is your duty to "give." I merely put that forward, not for the purpose of laying down the law or expressing any concluded opinion, but merely as illustrating the danger of laying down any general proposition and the necessity of considering each case on its facts.

The authorities which have been cited are few, and the facts with which they were concerned differed from the facts of this particular case. For instance, the authority on which reliance was principally placed was *Wessex Dairies, Ld.* v. *Smith* (1) in this court. There the defendant, who was a dairy roundsman, in his master's time proceeded to solicit customers of his master for the purpose of obtaining their custom in a business which he was shortly about to set up for himself. That is, I should have thought, a clear case, because he was doing it first of all in his master's time; and in his master's time he was making use of the information which his master had placed at his disposal, namely, the identity of the various customers and their particular requirements. Greer L.J., in the course of his judgment, placed some emphasis on the fact that the case was one in which the servant was using his master's time for the purpose of furthering his own interest. He said this: "The "defendant would nevertheless be under the ordinary implied "obligation existing between master and servant—namely, "that during the continuance of his employment he will act "in his employers' interests and not use the time for which he "is paid by the employers in furthering his own interests." Then lower down he says this: "During the subsistence of the "contract of service and during his master's time the servant "has to look after, not his own interests, but those of his "master." Then he quotes Hawkins J. in *Robb* v. *Green* (2) where he comments on *Nichol* v. *Martyn* (3). Hawkins J. had referred to utilization of the hours of service by being false to

(1) [1935] 2 K. B. 80, 84, 85.
(2) [1895] 2 Q. B. 1.
(3) 2 Esp. 732.

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Lord Greene M.R.

the master's interests. Then at the conclusion of his judgment Greer L.J. says: "In this case the defendant acted contrary "to his duty. During the last week of his service with the "plaintiffs, while pursuing his duty by calling on customers and "delivering milk to them, he tried to induce them to become his "customers after his employment with the plaintiffs was "terminated."

Maugham L.J. started his judgment with the following words (1): "The claim in this case raises a question of some "interest in relation to the duty of a servant to his master "during the period of his employment." He goes on and examines the earlier case of *Nichol* v. *Martyn* (2), which is not satisfactorily reported, and *Robb* v. *Green* (3), and he then said this, after looking at Hawkins J.'s judgment in that case: "That appears to show that Hawkins J. did not take the view, "which the other passage I read seems to indicate, that a "servant can properly canvass his master's customers for "himself as from a near approaching day. The question to be "determined essentially depends upon the term to be implied "in the ordinary case of a contract of employment in the "absence of express agreement." Then he refers to the fact that there was a reference to the duty of fidelity in the contract, but he said that he wished to decide the case on a wider ground. He quotes a passage from A. L. Smith L.J. in *Robb* v. *Green* (4), where he said: "'I think that it is a necessary implication "'which must be engrafted on such a contract that the servant "'undertakes to serve his master with good faith and fidelity'." Then he says (5): "On the other hand, it has been held that "while the servant is in the employment of the master he is not "justified in making a list of the master's customers." That is what had been done in *Robb* v. *Green* (6) and that immediately introduces a quite different set of ideas because if a servant took copies of his master's list of customers, he would be quite obviously committing a breach of duty in making use of something which is the master's property, namely, the list of customers, for an improper purpose, other than that for which he was employed. Then the learned Lord Justice says: "Another thing to be borne in mind is that, although the servant "is not entitled to make use of information which he has

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(1) [1935] 2 K. B. 80, 85, 88.

(2) 2 Esp. 732.

(3) [1895] 2 Q. B. 1.

(4) [1895] 2 Q. B. 315, 320.

(5) [1935] 2 K. B. 80, 89.

(6) [1895] 2 Q. B. 1; in C. A. ibid. 315.

" obtained in confidence in his master's service, he is entitled to " make use of the knowledge and skill which he acquired while " in that service." There he is dealing with the position of the employee after the service has terminated and is calling attention to the well known distinction between a man's skill, which is his own property, part of his own equipment, and confidential information which he has acquired during his service. Then again he points out that the facts complained of were done by the roundsman while going his round, and he said that was a deliberate canvassing at a time when the defendant was under an obligation to serve the plaintiffs with fidelity. Talbot J. appears to have agreed with both the judgments pronounced, and we have to consider to what extent the judgments assist us in deciding on an interlocutory application the proper course for this court to pursue.

Anything that I say on this matter stands, of course, to be varied and corrected when the full facts are known, but prima facie it appears to me the question we have to consider resolves itself into these elements. First of all, what was done here was done in the spare time of the employees. That leads to this : we have to consider what implication, if any, needs to be read into the contract of service with regard to the employee's use of his spare time. Does that implication in any way restrict him, or, rather (which is the practical question here) did that implication make it a breach of duty on his part to do what he did, with the consequential result that the defendants, in persuading the employees to do what they did, procured a breach of contract ? I think the judgment of Maugham L.J. in *Wessex Dairies, Ld.* v. *Smith* (1), which is quite deliberately placed by him on a broad ground, does lead to this. Although the case before him was concerned with an employee who had done certain things in his employer's time, I cannot find that in his reasoning that was regarded as an essential part of the offence. I cannot read the judgment as meaning that if the roundsman had on a Saturday afternoon, when his work was over, gone round to all these customers and canvassed them, he would have been doing something he was entitled to do. It would be a curious result if, quite apart from making use of the list of customers or his special knowledge or anything of that kind, he could set himself during his spare time deliberately to injure the goodwill of his master's business by trying to get his customers to leave him. Then again the question here is

(1) [1935] 2 K. B. 80, 85.

not a question of getting the customers to leave the business but a question of building up a rival in business to the prejudice of the goodwill of the employer's business.

I am not ashamed to confess that in the course of the argument my mind has fluctuated considerably on this question. As I see it, the court stands in a sense between Scylla and Charybdis, because it would be most unfortunate if anything we said, or any other court said, should place an undue restriction on the right of the workman, particularly a manual workman, to make use of his leisure for his profit. On the other hand, it would be deplorable if it were laid down that a workman could, consistently with his duty to his employer, knowingly, deliberately and secretly set himself to do in his spare time something which would inflict great harm on his employer's business. I have endeavoured to raise the questions in the way that they appeal to me and, on the best consideration I can give to the matter, I think that the plaintiffs are prima facie right in this case. That being so, what is the right course for this court to pursue ? Mr. Upjohn took several points, on the assumption that a prima facie case was established, to suggest that it was not a case for an injunction. He said, for instance that in the absence of the five workpeople in question the action was not properly constituted. There is no doubt that, in a way, it is unfortunate in an action complaining of procuring breach of contract not to have before the court the contracting party whose breach of the contract it is said the defendants have procured, but the circumstances of the present case are peculiar. There is a very good practical reason why these workpeople should not be joined, and I can see no reason why the court should not be able to decide the question satisfactorily in their absence. Then Mr. Upjohn said there is no case for an injunction because if the plaintiffs are right the workpeople could be dismissed for serious misconduct. That is a much more difficult thing under the Essential Work Order than would appear from that bald statement, because the plaintiffs have not the last word in the matter. It would be unreasonable to expect them, in the circumstance of the shortage of labour and the difficult procedure they would have to go through, to take any such course. The times are peculiar, and it seems to me that the plaintiffs are entitled to have the position considered in the light of the circumstances as they in fact exist and not in the light of some circumstances which might have existed in more normal times and would have given them a remedy ready to their hand which would have made it unnecessary for them to invoke the assistance of the court. Then Mr. Upjohn said in any case there is no case for an interlocutory order. I do not think myself that any of those arguments ought to be allowed to prevail.

This is a case of deliberate and secret action by these employees, deliberate and secret action by the defendants in circumstances where both the employees and the defendants must have known the exact result of what they were doing and must have realized that what they were doing was wrong, even if they did not distinguish in their minds between the question of commercial morality and legal obligation. That being so, and there being in my opinion a prima facie case and the balance of convenience and fairness being in favour of an injunction, I think the learned judge who took the other view came to the wrong conclusion. I should perhaps have mentioned that he did not think that once the question of confidential information was excluded there was sufficient left in the action of the plaintiffs' workpeople to constitute a breach of any implied obligation. It is on that point that I take a different prima facie view. The way the matter struck me was that prima facie, in the absence of direct authority on the point, he did not feel that he ought to say that the obligation of the servants in this case went as far as it was said it did. I have come to the opposite conclusion without expressing any final judgment on the matter, because we have not all the facts before us. I think that prima facie on the facts of this case so far as they at present appear, the conclusion ought to be the opposite one. That is the extent of our difference. In my opinion, the injunction asked for should be granted.

Morton L.J. I am of the same opinion, but in this somewhat unusual case I shall express my reasons for arriving at that conclusion in my own words as briefly as I can. The question arising on this motion is whether it was a breach of contract on the part of five employees of the plaintiff company to devote their spare time, or part of their spare time, to the service of the defendant company in the circumstances set out in the affidavits. If their conduct was a breach of their contract of service I think there would be no doubt that an interlocutory injunction should be granted. I cannot doubt that the whole matter was done with the knowledge and approval of the defendant company and its directors and, although in one part of his evidence Mr. Davis described these five employees as volunteers for the work, there was other evidence that invitations were issued to them by Mr. Davis or by his wife. On the other hand, if the court thinks that the breach of contract is not clear but that there is a substantial question to determine at the trial and that the plaintiffs have made out a prima facie case of breach of contract, then the court must consider the question of the balance of convenience.

It is clear that the five employees in question have not broken any express term of their contract of employment. It was not provided in their contract, for instance, that they should give their time exclusively to the work of the plaintiff company. What implied term, if any, has been broken? I am content, as Maugham L.J. was content in *Wessex Dairies, Ld.* v. *Smith* (1), to quote from A. L. Smith L.J. in *Robb* v. *Green* (2), when he said: "I think that it is a necessary "implication which must be engrafted on such a contract"—that is a contract of service—"that the servant undertakes to "serve his master with good faith and fidelity."

In all the circumstances of the case, have these five employees observed the obligations of good faith and fidelity? The work done for the defendants was done in what is usually described as the employees' spare time. No cases were cited to us in which work so done was held to be a breach of the obligation of fidelity to the employer. I do not propose to express any view of such a general nature as that all work done for a firm in the same line of business as the employers in the spare time of the employees is a breach of contract, but I do say that in my view the obligation of fidelity subsists so long as the contract of service subsists, and even in his spare time an employee does owe that obligation of fidelity. In my view, a prima facie case of a breach of that obligation is made out in the present case and I shall refer briefly to certain points which impressed me in the course of the evidence.

In the first place, it is plain from the affidavit of Mr. Diggle that the plaintiff company is at the moment the only source of supply in this country of midget valves for hearing aids other than the defendant company. When I say it is clear, that is the evidence before us, although, as my Lord has said, the evidence at the trial may throw more light on the matter. I couple with that piece of evidence from Mr. Diggle the evidence of Mr. Smith, who is a director of the defendant

(1) [1935] 2 K. B. 80, 88.

(2) [1895] 2 Q. B. 315, 320.

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company and is a practical man. He says in his affidavit: "Since the year 1925 I have been engaged in various branches "of the radio engineering and valve amplifier industry and I "have for several years been concerned with the manufacture "of hearing aids." Then he refers to the fact that there is a limited market for hearing aids and that they have been sold in his view at too high a price and that he intends to put on the market a hearing aid at a lower price. That is a direct form of competition which is contemplated by the defendant company. Mr. Davis makes it plain that while he, Mr. Davis, was occupying the important post of production engineer at the plaintiffs' factory at Harrow he was assisting in the promoting of the defendant company and co-operating with Mr. Smith. His conduct is not before us on this occasion and I make no comment on that. There is thus in this case assistance given to a competitor whose activities would I think inevitably result in damage to the plaintiff company if they were successful.

In the second place, I am impressed by the secrecy which was maintained throughout the time when these employees of the plaintiff company were working for the defendant company. I think that is a pretty plain indication that the employees knew perfectly well they were breaking an implied term of their contract of employment. I do not doubt that if the plaintiff company had been asked "Have you any objection to our "doing this in our spare time?" the answer would have been "You have no right whatever, in view of your contract of "service with us, to do any such thing." I suspect that the employees knew that perfectly well, and that is why nothing was said about it.

In the third place, although these workmen are doing manual labour, it is manual labour of a very skilled kind and it has been, as the evidence shows, of the very greatest assistance to the defendant company in bringing their activities up to the point when they can develop their business. The circumstances are that in this particular case these men have assisted the defendant company to develop its business from the early stages to that of a competitor.

The last fact, and a very important one, which I would mention is this. It is true that it is not established on the evidence as I see it that any confidential information has passed or could have passed in the past from the employees to the defendant company, but I think it is right to say, as

Mr. Andrew Clark pointed out, that any improvements in the assembly of the valves which may be introduced by the plaintiff company will almost inevitably be put into operation by the defendant company through these employees. It is very difficult to conceive that if the plaintiffs were showing the employees a new and improved way of making midget valves there would be no mention and no demonstration of that to the defendant company.

With regard to *Wessex Dairies, Ld.* v. *Smith* (1) it is true that the operations which were objected to were carried out by the milk roundsman actually in the time when he was employed about his master's business, but for my part I think if those same operations had been carried out while he had been employed by that master in the evening or on a Saturday afternoon, they would also have been held to be a breach of his duty of fidelity. It is true that Greer L.J. in the course of his judgment lays some emphasis on the fact that the hours of service were utilized for these purposes, but I do not think that any member of the court throws any doubt upon the proposition that those activities would have been improper even if they had been done in the employee's spare time. Having regard to all the facts, I think the plaintiffs have made out a prima facie case here, and one has to consider the balance of convenience.

Looking at it from the defendants' point of view, it does not seem to me that any irreparable harm will be done to the defendants if an injunction is granted and if it should subsequently turn out at the trial that an injunction should not have been granted. Mr. Smith says in his affidavit: " The defendant " company is now in a position to advise the Board of Trade " that it will be able to obtain and execute export orders, and " so apply for and obtain the necessary priorities to secure " skilled labour. There will be no difficulty in securing the " labour although it may involve some delay, and if in the " interim the defendant company is prevented from using the " services of the persons mentioned in para. 11 of the affidavit " of Harry Diggle, the production of the company will to some " extent be handicapped." Then he goes on to say that production can be continued without the services of those persons. So much for the position of the defendants.

On the other hand, taking the position of the plaintiffs, it seems to me a most unfortunate position if the plaintiffs are

(1) [1935] 2 K. B. 80.

compelled to have in their employment persons who week by week are assisting their rivals in the way described in the evidence. The learned judge suggested that the plaintiffs might impose a condition that the employees should not accept employment for any part of their time with the defendants, but I see grave difficulties in the plaintiff company achieving that result having regard to the terms of the Essential Work Order, and for my part I do not see why they should be faced with the alternative of trying to impose such a condition and possibly losing by so doing the services of valuable workmen. I think it is an intolerable position that this should be allowed to continue.

Finally, if one looks at it from the standpoint of the five employees in question, although they are not before the court, each of them in his or her affidavit uses the same phrase, which is a curious one, " I receive payment by way of expenses for " my work." I am not quite sure what that means, but I apprehend it is intended to convey the impression that they have only had their expenses paid. In those circumstances, it does not seem to me that it will involve any hardship on those five employees if they are prevented from making use of their leisure time in doing this no doubt rather hard work and getting nothing more for it than their expenses. I cannot think that the sorrow which they might feel at being deprived of that occupation should induce the court to refuse to grant an injunction. In my opinion the appeal should be allowed and an injunction granted in the terms of the notice of motion.

BUCKNILL L.J. I agree.

Appeal allowed.

Solicitors for plaintiffs : *Lawrance, Messer & Co.*
Solicitor for defendants : *Harold Benjamin.*

J. W. H.

VAISEY
J.
1946
Jan. 18.

In re PARROTT. COX *v.* PARROTT.

Will—Construction—Name and arms clause—Validity.

A testator directed his trustees to hold his residuary estate, subject to the life interest of his widow in the income, in trust for " Tim Harington Spencer Cox " (in the will called " Tim Spencer

"Cox") if on his attaining the age of twenty-one years he should assume and take the name of "Walter Tim Spencer Parrott" and assume, take or otherwise use the testator's crest and coat of arms "interspersed" with the crest and coat of arms of another family:—

Held, that both conditions were impossible of performance and void for uncertainty; that Tim Harington Spencer Cox was absolutely entitled in reversion, expectant on the death of the testator's widow, to the residuary estate; and that he was under no obligation to assume any name or any coat of arms.

The law relating to the alteration of Christian names and surnames considered.

ADJOURNED SUMMONS.

By his will, dated June 16, 1934, Walter Parrott directed his trustees (*a*) to pay, out of the income of his residuary estate, 150*l*. per annum for the maintenance and education of "Tim Spencer Cox" until he should attain the age of twenty one years; and (*b*) to pay free of duty the income of his residuary estate, subject to the said 150*l*. per annum, to his wife Mary Louisa Cotton Parrott during her life. By cl. 9 he directed his trustees, subject to the life interest of his wife in the income of his residuary estate, and to the payment of the 150*l*. per annum, "to stand possessed of the capital and income "of my residuary estate in trust for the said Tim Spencer Cox "if and when he shall attain the age of twenty-one years and "provided he shall within six months from the date of my death "or his attaining the age of twenty-one years by deed poll "assume the name of Walter Tim Spencer Parrott and provided he shall assume take or otherwise use my family crest "and coat of arms interspersed with the crest and coat of "arms of the Burgoyne family the baronetage of which was "created in 1641 and which became extinct on the death of the "tenth and last baronet Sir John Montagu Burgoyne in 1921." By cl. 10 he directed that, in the event of "Tim Spencer Cox" not attaining the age of twenty-one years and not complying with the conditions of cl. 9, the capital and income of the residuary estate should be held in trust for "such of the "daughters of my late brother G. L. Parrott as shall be living "at the death of the said Tim Spencer Cox in equal shares."

The testator died on June 21, 1938, Tim Harington Spencer Cox (in the will called "Tim Spencer Cox") attained the age of twenty-one years on August 10, 1945, and a summons was taken out by him to determine whether he was, or would, on executing a deed poll assuming the name of Walter Tim Spencer Parrott, either with or without the additional Christian name of Harington or the name of Cox or either of them, become absolutely entitled in reversion expectant on the death of the testator's widow to the residuary estate of the testator; or was bound to assume, take, or otherwise use the testator's family crest or coat of arms interspersed with the crest or coat of arms of the Burgoyne family as mentioned in cl. 9 of the will.

Heckscher for the plaintiff.

E. J. T. G. Bagshawe, R. Cozens-Hardy Horne and *C. G. A. Cowan* for various defendants.

VAISEY J. having stated the facts, said: The first question is whether the plaintiff, in order to establish his title to the testator's residuary estate must within six months from his attaining the age of twenty-one years, that is to say, on or before February 9, 1946, "by deed poll assume the name of "Walter Tim Spencer Parrott." What do those words mean? In my judgment, they express the testator's intention that the plaintiff should take the name of Walter Tim Spencer Parrott in lieu of and in substitution for his present name of Tim Harington Spencer Cox in a two-fold sense, that is to say, first that his compound baptismal name of Tim Harington Spencer was to be abandoned in favour of and replaced by the new compound name of Walter Tim Spencer, and secondly, that his surname Cox was to be altered to the surname Parrott. Now there would be no difficulty about the second part of the change, but I hold that the first part is impossible. Nobody can alter or part with a Christian name by deed poll. It would not, in my judgment, be right to attribute to the testator so fantastic and absurd an intention as that the plaintiff should assume the name of Walter Tim Spencer Parrott as a compound surname, either in lieu of, or in addition to, his patronymic Cox, nor would the court hold that his doing so would comply with the provision in the will. That is not what the testator meant him to do.

The law in this matter is, I think, accurately summed up in Davidson's Precedents and Forms in Conveyancing 3rd ed. vol. 3, part I., where, dealing with the subject of provisions requiring a legatee to take the name of a testator, it is said in the footnote on p. 361: "When the legatee is of a different "Christian name from the testator, he cannot of course part "with his own Christian name, nor can he take that of the "testator, except as part of a compound surname consisting of "the Christian name and surname of the testator."

Apart from the impossibility of fulfilling the condition as I interpret it, there are other points of uncertainty about it. What is meant by the word "assume?" Nothing is said as to any subsequent user of the assumed name, or as to the duration of any such user, and it may well be that the condition fails on the ground of uncertainty in addition to its being, as I hold, impossible.

There are only two, or at most three, ways in which a Christian name may be legally changed. First, it may be assumed, by the omni-competence of an Act of Parliament, as, for example, the Baines Name Act, 1907. Secondly, at confirmation, as explained in Phillimore's Ecclesiastical Law, 2nd ed., vol. I., at p. 517, where the following passage from Coke's Institutes I., 3a, is cited: "If a man be baptized by the "name of Thomas, and, after, at his confirmation by the bishop, "he is named John, he may purchase by the name of his confirmation. And this was the case of Sir Francis Gawdie, "chief justice of the Court of Common Pleas, whose name by "baptism was Thomas, and his name of confirmation Francis; "and that name of Francis, by the advice of all the judges, "in anno 36 Hen. 8, he did bear, and after use in all his "purchases and grants." Dr. Burn in the 9th edition of his "Ecclesiastical Law," vol. 2, p. 10, questioned the accuracy of the view that this is still the law, on the ground that "upon "review of the liturgy at King Charles the Second's restoration, "the office of confirmation is altered as to this point, for now "the bishop doth not pronounce the name of the person confirmed, and therefore cannot alter it." This, however, was a mistake, as is pointed out in Phillimore (ubi sup.), where it is said: "But Lord Coke's authority cannot be set aside in this "way. He had before him at the time when he thus laid down "the law the confirmation services of Edward and Elizabeth, "which are not, as might be inferred from the remark of "Dr. Burn, different in this respect from that of Charles the "Second. There seems to be no reason to impugn the authority "of the precedent cited by Lord Coke." Cases in which the precedent has been followed are mentioned in Phillimore, and there are records of others in Notes and Queries, 4th Series, 6, 17, and 7th Series, 2, 77; besides which, I know that bishops have in recent years on quite a number of occasions exercised this power, and there is a recognition of their right to do so in the directions given with reference to the Adoption of Children

(High Court) Rules, 1926, Ann. Prac., 1941, p. 2620, in which it is said "the names set out in the certificate of baptism cannot be altered except if the child is confirmed." The bishop's power is discretionary, and is only exercised for what he regards as a good and sufficient reason. It is said to have originated in the need for getting rid of "lasciva nomina," that is to say, names possessing some improper connotation which had been given in baptism incautiously, or had subsequently acquired such a connotation. A third method by which a Christian name may in a sense be altered is under the power to "add" a name when the child is adopted; but the precise quality of such an added name is I think open to some doubt, for no one can in strictness possess more than one Christian name, whether it consists of one word or of several, and this method may perhaps be regarded as anomalous.

[His Lordship then dealt with the second of the two provisos in cl. 9, holding that the time-limit of six months did not apply to it, and that it was void for uncertainty in that the operation of "interspersing" one crest and coat of arms with another crest and coat of arms is unknown in heraldry and incapable of performance, and proceeded :—]

There is further uncertainty in cl. 10 of the will. To make any sense of it at all, I should have to change the word "and" into the word "or," and I think that some words must have been left out by mistake. The will is in many respects very carelessly drawn, and, while I need not in this case rest my decision on any ground of public policy as in *In re Fry* (1), I cannot think that the court would wish to assist so inartistic an attempt to interfere with a man's name, the one thing which inalienably belongs to him and is the label which indicates his identity. I will declare that the plaintiff is now absolutely entitled in reversion expectant on the death of the testator's widow; that he is under no obligation to assume any name or to assume, take or otherwise use any crest or coat of arms; and that cl. 10 of the will in the events which have happened is no longer capable of having any operation.

The costs of all parties as between solicitor and client will come out of the trust estate.

Solicitors: *Summerhays & Co.*; *M. T. Turner & Co.*; *Golding, Hargrove & Palmer.*

J. L. D.

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(1) [1945] Ch. 348.

VAISEY
J.

1946

Feb. 12, 13,
22.

In re NORTHERN GARAGE, LIMITED.

Emergency legislation—Company—Winding-up—Receiver appointed by debenture-holder after compulsory winding-up order—Sale of property by receiver—Status of receiver—Courts (Emergency Powers) Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 19), *s.* 1, *sub-s.* 2 (*a*) (iii.).

In 1935 a company issued a debenture charging its assets and providing (inter alia) that if the principal moneys thereby received should become payable (which event happened) the debenture-holder might appoint a receiver, who should be the agent of the company and have power (inter alia) to sell or concur in selling any of the property charged. On January 20, 1941, an order was made for the winding-up of the company. On January 29, 1941, the debenture-holder obtained, in the presence of the liquidator, an order under the Courts (Emergency Powers) Act, 1939, authorizing him to exercise any remedy available to him by way of the appointment of a receiver. In February, 1941, the debenture-holder appointed a receiver, who in 1945 entered into an agreement for sale by him, as receiver for the debenture-holder, of certain leasehold property charged by the debenture. A summons was taken out by the purchaser, asking for a declaration that the receiver was bound to obtain (*a*) the concurrence of the company, acting by its liquidator, in the assignment to the purchaser, and (*b*) an order under the Courts (Emergency Powers) Act, 1943, authorizing the receiver to realize the security constituted by the debenture. At the hearing it was admitted that the company by its liquidator was a necessary party to the assignment :—

Held, that the order of January 29, 1941, having been made when the company was already in liquidation and in the presence of the liquidator, must be taken to have impliedly authorized the debenture-holder to appoint a receiver who could sell as agent for the company, and that therefore the receiver, selling as such agent, did not require the leave of the court under the Courts (Emergency Powers) Act, 1943.

In re S. Brown & Co. (*General Warehousemen*), *Ld.*, [1940] Ch. 961, and *In re Wood's Application*, [1941] Ch. 112, referred to.

ADJOURNED SUMMONS.

On January 22, 1935, a company created a debenture creating an equitable charge on its assets, and among the conditions endorsed thereon was a condition that the principal moneys thereby secured should become payable (inter alia) if an order was made for the winding-up of the company. There was also a condition that " at any time after the principal " moneys hereby secured became payable the registered " holders of this debenture may appoint any person to be a " receiver of the property charged by this debenture. . . .

" A receiver so appointed shall be the agent of the company " (who alone . . . . shall be responsible for his acts and " defaults and liable upon all contracts and engagements made " or entered into by him) and shall have power . . . . to sell " or concur in selling any of the property charged . . . . " This condition shall take effect as and by way of variation " and extension of the provisions of ss. 104 to 107 of the [Law " of Property Act, 1925] which provisions so varied and " extended shall be regarded as incorporated herein." In 1938, Walter F. Fedden became the registered holder of the debenture. On January 20, 1941, an order was made for the winding-up of the company and, on January 29, 1941, a summons was taken out by him in the Companies Court intituled " *In re* [the Company] and *In re* the Companies Act, " 1929, and *In re* the Courts (Emergency Powers) Act, 1939," whereby he asked for leave to proceed to exercise any remedy available to him (inter alia) by way of the appointment of a receiver of the property charged. The official receiver, who was the provisional liquidator of the company, was a party to those proceedings. On February 5, 1941, the registrar made an order that the applicant be at liberty to proceed to exercise any remedy available to him by way of the appointment of a receiver of the property charged by the debenture. On February 14, 1941, Walter Fedden by writing appointed Arthur Freeman Newton to be receiver of the property charged by the debenture, on the terms and with and subject to the powers and provisions contained in the conditions endorsed thereon. By an agreement, dated September 21, 1945, A. F. Newton agreed " as receiver on behalf of a debenture-holder " to sell to a purchaser certain leasehold premises charged by the debenture. The purchaser took out a summons asking for (inter alia) a declaration that A. F. Newton, in order to perform his part of the agreement, was bound to obtain the concurrence of the company (acting by its liquidator) in the assignment of the property to the purchaser; and an order under the Courts (Emergency Powers) Act, 1943, authorizing him to realize the security constituted by the debenture under which he sold. At the hearing it was admitted on behalf of the receiver that the company by its liquidator was a necessary party to the assignment.

Bowles for the purchaser. The receiver is realizing a security, and must obtain leave to do so under the Courts

(Emergency Powers) Act. The debenture provides that the receiver is to be the agent of the company, but in *Gosling* v. *Gaskell* (1) it was assumed that a receiver ceases to be agent for a company if the company goes into compulsory liquidation, and in the present case, therefore, the receiver never became agent for the company at all: *In re Courts* (*Emergency Powers*) *Act, 1939,* and *In re S. Brown & Co.* (*General Warehousemen*), *Ld.* (2). where a winding-up order was made after a receiver had been appointed with leave under the Courts (Emergency Powers) Act, it was held that the receiver ceased to be agent for the company and became agent for the debenture-holder, in which capacity he could not sell without leave. That decision governs the present case.

[VAISEY J. In the present case the winding-up order preceded the appointment of the receiver. The debenture provides that the receiver is to be the agent of the company. If the receiver when appointed could not be the agent of the company, may it not be that the appointment was wholly ineffectual ?]

That provision is inserted for the sole benefit of the debenture-holder and is not of the essence of the power to appoint a receiver. In *In re Wood's Application* (3) a receiver was held to be selling, as provided by the debenture, as agent for the company, but in that case the company was not in liquidation. If the receiver was agent for anyone, he was agent for the debenture-holder, but if he was not agent for the company his exact status need not be determined for unless he is agent for the company he is "realizing a security" within the Act. A sale of mortgaged property must be within the Act unless it is a sale by the mortgagor, and to treat the present sale, not as a realization of a security but as a sale by the company, is to disregard the true nature of the transaction. [He referred to *In re Henry Pound, Son & Hutchins* (4).] An order under the Courts (Emergency Powers) Act cannot have any positive effect or confer some special status on a receiver : all the court can do is to remove the prohibition imposed by the Act.

Hewins for the receiver. When the application for leave to appoint a receiver was made, the company was already in liquidation and, by its liquidator, attended the application. All those concerned must have contemplated that the receiver would wish to sell, and the order authorizing the appointment of a receiver must be treated as impliedly authorizing the receiver when appointed to exercise, without further leave, all the powers conferred on him by the debenture. Where a company has ceased to be a going concern, the court, in giving leave to appoint a receiver, has in mind what will be the probable consequences of the appointment.

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(1) [1897] A. C. 575.
(2) [1940] Ch. 961.
(3) [1941] Ch. 112.
(4) (1889) 42 C. D. 402.

Bowles in reply.

Cur. adv. vult.

Feb. 22. VAISEY J. reading a judgment, after stating the facts, said: The receiver's counsel at the hearing withdrew for the first time the contention of his client that the concurrence of the company in the assignment was unnecessary, and he was, in my judgment, right in doing so, for I think that the receiver's powers do not, in any view of the matter, extend to the effective assigning of the property for the residue of the term created by the underlease. But the substantial point in the case is as to the status of Mr. Newton as receiver, and it seems to me to be not without difficulty. Four propositions may be suggested for consideration as follows :—(1.) that he was never validly appointed receiver; (2.) that he was validly appointed, and became on appointment and continued to be the agent of the company; (3.) that he was validly appointed and became on appointment and continued to be the agent of Mr. Fedden, who appointed him; and (4.) that he was validly appointed, without becoming the agent of anybody. It seems to me that one of these propositions must be right. They are mutually exclusive, and I think that I have to choose between them.

As regards proposition (1.), the case for the total invalidity of Mr. Newton's appointment rests on the view that on the order for the winding-up of the company being made it ceased to be possible for Mr. Fedden or anyone else to appoint a person to act as agent for the company, and that the debenture in the present case (both in its express terms and according to the statutory provisions which it incorporates) confers no power of appointing a receiver except on the footing that such an agency will be created and arise. But in *Gosling* v. *Gaskell* (1) and *Thomas* v. *Todd* (2), where the sequence of events was reversed, the appointment of the receiver coming first and the winding-up order or resolution second, though it was held that the receiver ceased to be the agent of the company on the

(1) [1897] A. C. 575.

(2) [1926] 2 K. B. 511.

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winding-up, it was not held that he ceased to be receiver. See also *In re Courts (Emergency Powers) Act, 1939*, and *In re S. Brown & Co. (General Warehousemen), Ld.* (1). It seems to me that if a receiver can continue to be receiver after the loss of the prescribed agency, he could equally well become receiver without ever obtaining such agency. I suppose that the receiver's contemplated position as agent of the mortgagor must be regarded as not of the essence of his position and status as receiver. However that may be, I am certainly not prepared to hold that a power to appoint a receiver is destroyed by and cannot be exercised after a winding-up order, though its efficacy is, of course, much impaired thereby, seeing that a receiver must obtain the leave of the court if he wishes to interfere in any way with the progress of the liquidation or the possession of the liquidator (see *In re Henry Pound, Son & Hutchins* (2)).

I have thus to choose between propositions (2.), (3.) and (4.), and in making that choice I must plainly have regard to the particular circumstances of the present case. The order of February 5, 1941, under the Courts (Emergency Powers) Act, 1939, was made in the presence of the representatives of the company and the liquidator, and referred in terms to all the four instruments of charge under the express or implied terms of each one of which Mr. Fedden as applicant had and was expressed to have power to appoint a receiver, such receiver to be the agent not of Mr. Fedden but of the company. No objection was made to the order on the part of the company or the liquidator, and I must assume that they were fully acquainted with the contents of the documents, and were aware of their legal effect. What conclusion am I to draw from this state of facts? I think that, on the whole, I must read the order as empowering Mr. Fedden to appoint a receiver according to the tenor of the documents, that is to say, a receiver who was to be the agent of the company notwithstanding the fact that it was in liquidation. In coming to that conclusion, adopting proposition (2.) and rejecting propositions (3.) and (4.), I have had to consider whether I ought to do so without having the company and the liquidator before the court. They are not, however, to my mind, really concerned, because the only result of my decision will be to enable the receiver as agent of the mortgagor company to realize the security without any further leave from the court under the Courts (Emergency Powers) Act, 1943, being required: see *In re Wood's Application* (3).

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(1) [1940] Ch. 961.

(2) 42 C. D. 402.

(3) [1941] Ch. 112.

There is no doubt, I think, that if he were agent of the mortgagee (that is Mr. Fedden) or if he were in the anomalous position of being the agent of neither party (as indicated in *Gosling* v. *Gaskell* (1) and in *Thomas* v. *Todd* (2)), such leave would have been necessary; see the observations in *In re Courts* (*Emergency Powers*) *Act, 1939*, and *In re S. Brown & Co.* (*General Warehousemen*), *Ld.* (3), and *In re Wood's Application* (4). Had it not been for the order of February 5, 1941, and the particular circumstances in which it was made, I should have come to the opposite conclusion, and held that the receiver became on his appointment the agent of Mr. Fedden, or at any rate did not become the agent of the company; see *Thomas* v. *Todd* (2). Those circumstances, however, to my mind, make all the difference.

I shall, therefore, deal with the first paragraph of the summons by ordering as follows: "The respondent by his "counsel admitting that he is bound to obtain the concurrence "of Northern Garage (King's Cross), Ld., acting by its liquidator in the assignment of the property to the applicant "Declare that the respondent was not and is not bound to "obtain any further order under the Courts (Emergency "Powers) Act, 1943, to enable him to sell and with such "concurrence to assign the said property to the applicant." I should like to add that the point which I have decided may well have been regarded as a doubtful one, and that it would in my judgment have been better if the order of February 5, 1941, had expressed what was the admitted intention of all parties, namely, that the mortgagee (Mr. Fedden) was to be at liberty to realize the security either by himself, or by the receiver whom he was thereby given leave to appoint.

Solicitors: *Robbins, Olivey & Lake; Ridsdale & Son, for William Addiscott, Penshurst.*

(1) [1897] A. C. 575.
(2) [1926] 2 K. B. 511.
(3) [1940] Ch. 961.
(4) [1941] Ch. 112.

J. L. D.

Discussed. Gibson *v.* South American Stores. [1949] 1 Ch. 572

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Mar. 11, 12, 13.

Lord Greene M.R., Morton and Somervell L.JJ.

In re HOBOURN AERO COMPONENTS LIMITED'S AIR RAID DISTRESS FUND.

Approved. Oppenheim *v.* Tobacco Securities Trust [1951] A. C. 297

RYAN *v.* FORREST.

Charity—Voluntary collections from employees of munition factories—War Emergency Fund—Benefits for ex-employees serving in the Forces—Change to air raid distress fund—No means test applied to applicants—Destination of surplus of fund—No charitable trust—Trust for body of private individuals—Repayment of contributors.

During the war years from 1940 to the end of 1944 collections were made weekly from the employees of a company operating three factories, at first informally and later by agreed deductions from wages, towards a war emergency fund. The money was for some time expended on comforts or money payments for ex-employees serving abroad or at home. After September, 1940, it was decided to use the collected funds also to relieve, and after January, 1944, solely to relieve cases of employees who had suffered damage and distress from air raids. Claims were only entertained from persons who had contributed to the fund, but no means test was imposed on any application. The fund having been closed a summons was taken out for determination of how the surplus moneys were to be dealt with. Cohen J. (ante, p. 86), held that there was no public charitable purpose in regard to the fund and that the contributors were entitled to a return of a due proportion of their contributions but must bring into hotchpot any benefit they had already received. On appeal by the Crown:—

Held (affirming Cohen J.'s decision), that the fund was not held on any charitable trust. It was a fund collected by employees of a company to provide benefits for themselves and in view of this personal relationship the fund was not applicable for the benefit of the public or any section of the public so as to make it subject to a charitable trust within the fourth class of charitable trusts laid down by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* [1891] A.C. 531. Nor was there any element of poverty in the present case so as to bring it within those cases where trusts which appeared otherwise to be of a private nature were held to be charitable because they were for the relief of poverty.

In re Compton [1945] Ch. 123 applied.

Per Morton L.J. *In re Drummond* [1914] 2 Ch. 90 approved.

Per Lord Greene M.R. The headnote in *Pease* v. *Pattinson* (1886) 32 Ch. D. 154 is incorrect.

APPEAL from Cohen J. (1).

Hobourn Aero Components, Ld., formerly called Pattison & Hobourn, Ld., manufactured aeroplane parts. Before the

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(1) Ante p. 86.

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war their only factory was at Coventry, but during the war, under the dispersal arrangements, they took over two shadow factories one at Kettering and one at Market Harborough. When all those factories were open, the number of their employees was thirteen hundred, of whom seven hundred were at Coventry, three hundred at Kettering, and three hundred at Market Harborough. Before the outbreak of the present war, the employees of the company (then only some four to five hundred in number) had established a voluntary fund called the "Benevolent Fund" into which they paid a penny a week-end from their wages. In addition, they made voluntary contributions, effected by deductions from wages, which were used and distributed partly in subscriptions to hospitals, so as to provide more favourable terms for such of them as might be attending the hospitals, and partly in donations to St. Dunstan's, Dr. Barnardo's and the Red Cross. All these contributions were voluntary and the company took no part in the administration of the funds, which were managed by a committee elected by the employees, the money being in the hands of some of them as trustees. By the end of the year 1939, certain of the employees had joined the forces, and some had proceeded overseas. Thereupon the employees started making weekly "hat" collections among themselves at the factory for the purpose of forming a fund from which there could be provided and sent to former employees serving in the forces parcels of food, clothing and cigarettes. The parcels were sent to such former employees whether they had themselves contributed to the collections or not, and also out of the collections there were paid from time to time to such former employees when on leave small sums of money in the nature of leave grants. On August 27, 1940, a meeting of the benevolent fund committee was held at which it was decided that the old benevolent fund ought to be kept separate from the War Emergency Fund, and separate accounts were opened, described as (*a*) the Pattison & Hobourn Benevolent Fund, and (*b*) the Pattison & Hobourn War Emergency Fund. The latter was intended to cover soldiers' parcels, soldiers' leave grants and grants to employees who were awkwardly placed due to air raids or other damage, and it afterwards became the account of the Air Raid Distress Fund. No rules or regulations in regard to this Air Raid Distress Fund were ever made, but in November, 1940, about the time of the first big air raid on Coventry, a printed form was issued to all the employees of the company inviting them to contribute to the fund by way of deduction of wages. The first two paragraphs of the printed form read as follows: "The purpose of this Fund is to help any employee who is "in dire distress as the result of enemy action. It does not "aim at replacing all losses incurred but to give a helping "hand at a time when you most need it. Claims made on "this Fund should be made in writing, and a claim form is "to be completed . . . ." The form went on to ask for the appointment of a special committee of five members and continued: "It is to be understood that by this vote you "are investing in the committee the necessary powers to "deal with all claims and that subject to Mr. P. L. Hobourn's "approval their decision on all matters connected with this "fund are final. Further, it is suggested that the Saturday "collection be discontinued, and instead a sum of 2*d.* in the "pound per week be deducted from your wage. Are you in "agreement that 2*d.* in the pound be deducted each week for "the Distress Fund for Pattison & Hobourn, Ld.?"

All the then employees except five signed this form. No deductions were made from the pay of the five persons who refused to sign the original form or of one new employee who objected to such deductions. With these exceptions, deductions were made in all cases. Gifts were also made to the fund, of 200*l.* from Mr. P. L. Hobourn, the managing director, 30*l.*, of which 10*l.* was to go to the Mayor's Distress Fund, from Mr. Kirk, and 36*l.* by subscriptions from the Local Defence Volunteers. Further the balance of the hat collection fund was transferred. Expenditure from the fund fell under two headings: first, payments to former employees serving in His Majesty's forces, and secondly, payments in respect of air raid distress. Payments to those serving in His Majesty's forces fell into two categories: first, a per capita payment of 1*l.* a month sent to each man serving or, if so requested by any man, invested on his behalf in National Savings Certificates, and secondly, payments to men returning on leave. Payments in respect of air raid distress were mainly grants for clothing and the like urgently required by victims of the air raids on Coventry, but some payments were made to employees at the factories whose homes in London had been damaged by enemy action, to cover their expenses in going to London to ascertain their position. The committee refused to recognize claims by any employees who did not contribute to the fund, and in considering a claim no means test was applied. The total aggregate amount expended on both classes of expenditure was 2,574*l.* 6*s.* 0*d.* of which 2,102*l.* 17*s* 6*d.* went on grants to soldiers and 471*l.* 8*s.* 6*d.* on air raid damage relief. On January 15, 1944, the committee resolved "that as from "January 31, 1944, grants to ex-members serving with the "forces should be discontinued, and that the fund be continued "solely as an Air Raid Distress Fund to assist employees or "ex-employees with the forces who have suffered the loss of "their homes or contents by enemy action." Thereafter with the exception of a few payments for expenses no payments were made out of the fund either to ex-employees serving in His Majesty's forces or for air raid distress relief. In September, 1944, it was decided to stop deductions from wages and on September 7, 1944, a resolution was passed that the fund be liquidated immediately, and that the proper percentage due be given back to all subscribers to the fund, and that a Sick and Benevolent Fund be started from scratch at the cessation of hostilities. In these circumstances a summons was taken out by members of the committee of the fund to obtain the decision of the court as to the proper disposition of the balance of 5,886*l.*

Cohen J., held that, although all the objects of the fund were charitable, no public charitable purpose was shown. The beneficiaries did not constitute a section of the community, but only a fluctuating body of private individuals whose relationship to the company employing them was purely personal. He therefore directed a return to contributors of a due proportion of their contributions, each contributor who had already received any amount by way of benefit bringing it into hotchpot. The Attorney-General appealed.

Sir Hartley Shawcross A.-G., *Upjohn K.C.* and *Danckwerts* for the appeal. The fund is held on a valid charitable trust, and it is no objection that (after the gifts to ex-employees at the front had ceased) the benefits were for contributors only, and that those contributors were the employees of the company. It is not like a case of mutual insurance when benefits are enjoyed equally. Nobody in the present case had a contractual right to benefit but any person within the class might be considered for benefit. Where a body of persons contribute to a fund to be applied for the benefit of any of them in distress, it is a good charitable object: *Royal*

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Antediluvian Order of Buffaloes v. *Owens* (1) in which the actual decision is distinguishable by reason of the mutuality of the benefits; *Inland Revenue Commissioners* v. *Peebleshire Nursing Association* (2); *Inland Revenue Commissioners* v. *Society for Relief of Widows and Orphans* (3); *In re Buck* (4). It is conceded that a case when an association of persons contribute for their own benefit is not per se for charitable purposes, though it is when the fund collected is for the relief of poverty. It is suggested however, that there are other conditions which make such a fund charitable as when a society with funds collected by subscriptions from its own members applies them for such a purpose as the relief of air raid distress. When, as here, an association of persons who are neither very poor nor rich, but who might well suffer great distress from air raids, it is for the public benefit that they should be helped. It is only because latterly there was no large scale bombing at the places where the factories were that so little of the fund was in fact applied for this purpose. If in respect of such a fund there is no contractual right to any benefit and the fund is applied for a charitable purpose, as for the relief of poverty or distress, that is a charitable fund. Even though some payment was made of fares for men who had their houses in London damaged by air raid and needed to go and inspect the nature of their loss, that does not prevent the objects from being charitable. Authorities supporting these contentions are *R.* v. *Income Tax Special Commissioners* (5); *Pease* v. *Pattinson* (6); *Cunnack* v. *Edwards* (7); *Shaw* v. *Halifax Corporation* (8); *In re Forster* (9); and *Spiller* v. *Maude* (10).

The object of this fund as defined in the only material documents is relief of "dire distress as the result of enemy "action." The trust falls within the fourth of the classes enumerated by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (11) as being for the public benefit. Nothing in the days of war could be more beneficial to the community at large than an air raid distress fund. It was even more important as an object than the relief of poverty in

(1) [1928] 1 K. B. 446.
(2) (1926) 11 Tax. Cas. 335.
(3) Ibid. 1.
(4) [1896] 2 Ch. 727.
(5) (1925) 10 Tax Cas. 73, 84.
(6) (1886) 32 Ch. D. 154.
(7) [1896] 2 Ch. 679.
(8) [1915] 2 K. B. 170.
(9) [1939] Ch. 22.
(10) (1881) 32 Ch. D. 158 *n.*
(11) [1891] A. C. 531.

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times of peace. The object of this fund is within Lord Herschell's words in *Pemsel's* case (1) : see also *In re Hillier* (2). Subscribers to the fund were not the only persons to benefit Ex-employees were also included. In any case *In re Drummond* (3) was decided on a wrong principle and it was not necessary to the decision of the Court of Appeal in *In re Compton* (4) to confirm it. When there is a personal element such as that of descent connecting the persons to benefit, the personal element is obvious and there can be no charitable object. It is very different when the only personal tie is that of common service : see Tudor on Charities (5th ed.), pp. 18, 24. The correctness of the decision in *In re Compton* (4) is not challenged but observations in that case were too wide and unnecessary to the decision. The law must be expanded to meet the needs of modern times when the public is alive to the importance of the relief and care of employees. It would be absurd that a trust for the benefits of a small parish as in *Goodman* v. *Mayor of Saltash* (5) should have been treated as for the public benefit while one for the benefit of employees of a large company such for instance as the London Midland and Scottish Ry. Co. should not. There can be no difference in principle. Moreover cases where persons are held together by ties other than residence have been held to come within the fourth class at any rate when the relief of poverty was concerned (see *In re Forster* (6)), and that should be extended to cases where other benevolent objects are involved, and especially such an object as relief of distress from air raids. [They referred also to *In re Gosling* (7) ; *In re Tree* (8).]

Christie K.C. and *Hillaby* for the respondent employees were not called on.

J. G. Strangman for the trustees of the fund.

LORD GREENE M.R. : In spite of the very full arguments which have been addressed to us, I do not find any real difficulty in this case. The first thing to do, of course, is to appreciate the facts, since all these cases must depend in the first place upon their own particular facts. [His Lordship stated the facts and continued] : The question we have to decide is whether this Air Raid Distress Fund was a charitable fund within the legal sense. The Attorney-General and Mr. Upjohn have argued that it is and they admit that their argument involves the Inland Revenue Commissioners having been wrong in refusing to recognize it as a charity and to grant income tax relief. However, that is by the way. Cohen J. held that he was bound by the recent decision of this court in *In re Compton* (1) to hold that a fund of this kind, limited in its application to employees and, to a small extent, ex-employees of the company, was not a good charity because it lacked the necessary public element, and that it was a private charity having regard to the restricted and entirely personal nature of the relationship which bound together the potential beneficiaries. We have had an argument addressed to us to the effect that the observations of this court in *In re Compton* (1) on the question of a trust for the benefit of employees of a business, which, in *In re Compton* (1), we said constituted a purely private and personal trust, were dicta only and were not necessary for the decision. I have listened very attentively to all the arguments which have been put before us and to all the cases which have been cited. I may, perhaps, be allowed to say that nothing which has been said and no authority which has been cited leads me to doubt the correctness of the views which I ventured to express in *In re Compton* (1). The present case has a feature which was not present, of course, in *In re Compton* (1). That was not a case of employees, but a case of descendants of particular persons. The fund now in question was one put up by the potential and contemplated beneficiaries themselves. We are not dealing with a fund put up by outside persons, although, even if we were, I should on the authority of *In re Compton* (1) feel constrained to hold that such a fund would not be a good charity. The point to my mind which really puts this case beyond reasonable doubt is the fact that a number of employees of this company, actuated by motives of self-help, agreed to a deduction from their wages to constitute a fund to be applied for their own benefit without any question of poverty coming into it. Such an arrangement seems to me to stamp the whole transaction as one having a personal character, money put up by a number of people, not for the general benefit, but for their own individual benefit. I am not concerned to dispute the proposition that a fund put up for air raid distress in Coventry generally would be a good charitable gift. I have very little doubt that it would be. But there is all the difference in the world between such a fund and a fund put up by a dozen inhabitants of a street, or, it may be, a thousand employees of a firm, to provide for themselves out of moneys subscribed by themselves some kind of immediate relief in case they suffered from an air raid. The Attorney-General and Mr. Upjohn wish to attribute to the fact that these people were putting up money for their own benefit a very slight importance. To my mind, it is of the greatest importance and is quite conclusive in stamping the character of a private and personal trust upon this fund.

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(1) [1891] A. C. 571.
(2) [1944] 1 All E. R. 480.
(3) [1914] 2 Ch. 90.
(4) [1945] Ch. 123.
(5) (1882) 7 App. Cas. 633.
(6) [1939] Ch. 22.
(7) (1900) 48 W. R. 300.
(8) [1945] Ch. 325.

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(1) [1945] Ch. 123.

It has been suggested that this aspect of the matter should be disregarded because no individual was entitled as of right to any payment out of the fund. I cannot appreciate that argument. If a number of individuals put up a fund for their own mutual benefit, there are clearly two ways of doing it. They can either actuarially or in some other way decide that each subscriber shall be entitled in certain events to definite payments, or, especially when the object of the fund is something of the present kind, they may say : " Rather than have " a cast iron scheme laying down the grant that a subscriber " is to be entitled to, we will leave it to the discretion of " a committee in whom we have confidence, to decide how to " apply the fund." Such an arrangement has all the benefits of elasticity, but it seems to me that the attempt to draw distinction as between such an arrangement and an actuarially based arrangement entirely fails. When once the payments to ex-employees are out of the way, it is admitted that the Air Raid Distress Fund was mainly intended, as it was mainly applied, for the benefit of subscribers and subscribers only. Those employees who had refused to sign the circular were excluded from the benefits of the fund. The only respect in which non-subscribers got any benefit was in the case of families of serving ex-employees who had had their homes injured by air raids. They indeed may very well have been subscribers before they joined the Services. What the extent of that application was I do not know, nor am I concerned to inquire whether or not the committee, in deciding to include such persons in the benefits of the fund, were acting within the scope of their charter. I will assume that they were, but it is clear that the paramount object of this fund was to benefit subscribers and nobody else. That seems to me to stamp it with the character of a private arrangement, a private trust.

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One other matter to which reference was made, though not much reliance was placed on it, was the fact that Mr. Hobourn and Mr. Kirk and the Local Defence Volunteers had sent cheques to the fund. I cannot attribute any importance to that fact. These contributions formed a very small proportion of the funds received. They were not the result of a public appeal ; but simply gifts by a few persons who were interested. It is impossible, because of that circumstance, to attribute to the fund a different character. It was, in its essence a fund put up by individuals for their own benefit. I must not be taken to be suggesting that the mere fact that the benefits of a fund are confined to members or subscribers would be sufficient of itself to exclude a fund from the category of charity. It all depends on the facts of each individual case. If a number of charitably-minded individuals in a parish got up a subscription for the purpose of providing a parish nurse for inhabitants unable to pay for nursing, the fund so subscribed would not be any the less a charitable fund because no person in the parish could obtain the services of the nurse unless he or she became a member of the association and paid, let me say, half a crown a year. That would not turn what was in essence a charity into something not a charity. It is all a question in these cases of the real paramount and governing nature of the transaction. In the example I put the elements which are present in the present case would not be present, because the paramount and primary purpose of this fund is, in my view, self-help and nothing else.

That leads me to the next branch of the argument which is to this effect. It is said that in cases falling under the fourth of Lord Macnaghten's classes as laid down in *Pemsel's* case (1), of which this is said to be one, the relief of poverty is not necessary. Of course it is not. The relief of poverty comes under a separate head and under the fourth class many trusts are included although they may benefit both rich and poor. It is then said, and I am prepared to accept it as correct, that the relief of air raid distress would be in itself a good charitable object. That, of course, does not decide the question because the question here is not whether a particular object in the abstract is a good charitable object, but whether the purposes of this fund were a good charitable object, from the point of view not of the type of misfortune

(1) [1891] A. C. 531.

at which it was aimed, but of the beneficiaries. The question was whether the fund from that point of view was a purely personal or private affair, a private fund for private benefit, or had the necessary element of publicity. It was argued that in cases to which we were referred an association which had all the characteristics on its face of a private association for individual benefit had been regarded as a charity because it was directed to the relief of poverty. They were cases which suggested or, in some instances perhaps, decided that a fund which is prima facie of a private and individual nature may be saved by the fact that it is for the relief of poverty. Then the argument goes on " Why relief of poverty alone ? Why " not include in such cases such an object of relief as air raid " distress ? " It is said that the fact that this fund was intended to give relief in cases of air raid distress makes it possible to predicate of its objects that they were not purely personal but had a public element sufficient to give them the character of charity. In my opinion, that is a confusion of thought. The object is one thing ; the people to benefit from that object are another. It is certainly not the law, as I understand the authorities, that when the persons to benefit are a private group of individuals that circumstance can be discounted or the effect of it destroyed merely by introducing some object which, if it was for the benefit of a sufficiently public class of beneficiaries, would be a good charitable purpose within Lord Macnaghten's fourth class.

It is necessary to refer to some of those cases. First, I will read a passage from Tudor on Charities, 5th ed., p. 18. It says this : " Friendly and other mutual benefit societies " established to provide allowances for members in sickness " or old age, or pensions for their widows, are not charitable, " unless poverty is an essential qualification for the receipt of " relief, for the object of such a society, except where it " involves the relief of poverty, is not one contemplated by the " Statute of Elizabeth. And if the objects of the society " are not such as to constitute it charitable the fact that it " receives donations and subscriptions cannot alter its " character." A number of authorities are referred to in support of those propositions. We have been referred to practically all of them and it seems to me that they amply bear out the propositions stated in the text. This particular association of persons may properly, I think, be described as a mutual benefit society, which cannot be charitable unless

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poverty is an essential qualification. In *In re Compton* (1), I referred to what are commonly known as the poor relations cases, in each of which, as regards a class of potential beneficiaries of a strictly private and personal nature, it had been held in past days that a charitable character was, nevertheless, attributable to the trust if it was a trust for the relief of poverty. The cases mentioned in connexion with this passage in Tudor were not quoted to the court on that occasion, and if I have any criticism of the decision in *In re Compton* (1), it is that, in referring to the poor relations cases as in a category by themselves, I might have added a reference to the other cases mentioned in Tudor as falling into the same category. But no authority has been cited to us which would justify the proposition that what is prima facie a personal or private trust can be saved except on the ground that its purpose is the relief of poverty.

What I have said will perhaps be made clearer by reference to one or two of the authorities which were cited. First, there is *In re Clark's Trust* (2). That was a case of a Friendly Society which was held not to be a good charitable institution on the ground that it was a private charity, that is to say, a charity not recognized as a charity by law. I can get no help out of that decision except that Hall V.-C. calls attention to this in connexion with the rules of the society: " Poverty " of the member at the time of his sickness or lameness, or " in his old age, was not required to entitle him to an allowance. " It appears to me that the society was not a charitable " institution." Then comes a decision of Sir George Jessel in *Spiller* v. *Maude* (3). That case really brings out exactly the point which I mentioned a moment ago. There was a society which had every mark of a purely personal association with no public element in it at all. It was " called the York " Theatrical Fund Society . . . . instituted in York by the " voluntary association and subscriptions of the members of " the York Company of actors and actresses." Under the rules no person save a member of the company was entitled to any benefit at all. The objects were to provide the funeral expenses of a contributor dying in indigent circumstances, the relief of orphan children of contributors, the supply of medical advice and medicines to sick contributors unable to pay, and to grant annuities to contributors becoming incapacitated by age, accident, or other infirmity, from exercising the duties of his or her profession as an actor or actress and not possessing an independent income of more than 50*l*. per annum. There was a case which seems prima facie to lack any element of publicity and it could not in any sense be described as being for the benefit of a section of the public. It is true that the funds of the society were augmented by subscriptions from non-members, but the important thing about the case is the way in which Sir George Jessel dealt with it. He went through the rules and came to the conclusion that the whole fund was charitable but that the particular charity had failed. He thought that poverty was clearly an ingredient in the qualification of members who were to receive the benefits of the society. It is perfectly clear that he regarded poverty as the thing that saved it. I must confess, speaking for myself, that this seems to me to be a very extreme decision, because the whole arrangement was of a personal nature. However, it was saved by the fact of poverty, but there is no suggestion in any of the cases put before us that such a body can be treated as having a charitable purpose unless the relief of poverty is its object. In *Pease* v. *Pattinson* (1), a decision of Bacon V.-C., the headnote is completely incorrect when it states that a Hartley Colliery fund, which was a Friendly Society, was a charity. Bacon V.-C. decided no such thing. On the contrary, his decision quite clearly implies the contrary, because in ordering that the fund with which he had to deal should be handed over for a *cy-pres* administration to that particular body, he directed that it should be kept separate and earmarked for a particular charitable purpose and he rejected an argument that the body could take it as part of its own funds as being itself a charity. The decision, again, is of no assistance to the argument and, as I say, the headnote is clearly inaccurate. I might, refer, perhaps, to *Shaw* v. *Halifax Corporation* (2). That was a case which again, does not help us. It turned on the meaning of the phrase " public charity " within the Towns Improvement Clauses Act, 1847. Then reliance was placed on *In re Forster* (3), decided by Bennett J. That is a decision which I have great difficulty in understanding. The learned judge found it possible there to hold that a fund for the relief of infirm, sick and aged Roman Catholic priests in a particular diocese was for the advancement of religion and, therefore, good, although the benefits from the fund were confined to members. He did not deal with it as a case for the relief of poverty, which it clearly was not, but he laid stress on the fact that the funds were mainly derived from donations from non-members. It may very well be that the decision could be justified on the principle I suggested a moment ago that, if you find a number of charitable persons setting up a fund for the benefit of a particular class, the fact that members of that class are required to join the fund and pay some small subscription does not prevent it from being charitable. Possibly it may be supported on that ground, but it is not a decision from which, with all respect, I find any help in the present case.

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(1) [1945] Ch. 123.
(2) (1875) 1 Ch. D. 497.
(3) 32 Ch. D. 158 *n.*

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(1) 32 Ch. D. 154.
(2) [1915] 2 K. B. 170.
(3) [1939] Ch. 22.

I am only going to refer to two more cases. The first is *Hall* v. *Derby Sanitary Authority* (1). That related to a trust for railway servants. It is said that if a trust for railway servants can be a good charity, so too a trust for railway servants in the employment of a particular railway company is a good charity. That is not so. The reason, I think, is that in the one case the trust is for railway servants in general and in the other case it is for employees of a particular company, a fact which limits the potential beneficiaries to a class ascertained on a purely personal basis. Moreover, the fund would benefit the particular railway company. The other case to which I wish to refer is of assistance, because it brings out the underlying fallacy of the argument. That is a case decided by Vaisey J. of *In re Hillier* (2). The testatrix left legacies to go to the sick and wounded. No question could arise as to the class being limited to a purely private circle. It was obviously for sick and wounded at large and, therefore, had every qualification of a public nature which could be required. Therefore, the question we are dealing with did not arise in that case. It was quoted to us in order to establish the proposition that such a trust could be good although it was not for the relief of poverty. It seems to me, with all respect to the argument, that that is pushing at an open door. Of course, cases which come under the fourth head of Lord Macnaghten do not require poverty as an element to make them good charities. All that *In re Hillier* (2) decided was that the object there was a good charitable object and the question of whether the public element was present in it did not arise. The importance of poverty in my opinion

(1) (1885) 16 Q. B. D. 163.

(2) [1944] 1 All E. R. 480.

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is that it is a necessary object where the class of trust with which you are dealing is one which prima facie is for the purely personal benefit of individuals. It may be possible on the authorities, as I have said, to get such a trust into the category of charity, provided it is for the relief of poverty on its true construction. It is no argument to say because in *In re Hillier* (1) poverty was not regarded as essential, therefore it is not to be regarded as essential in such a case as this. The two cases are quite different, because in the present case everything about the arrangement points, and points only, to a purely personal scheme for the individual benefit of subscribers, with a certain latitude left to the committee, to let in families of serving ex-employees whose houses were injured by air raids.

Cohen J., as he then was, decided the case on the basis of *In re Compton* (2). I have no criticism to make of his decision in that respect, but I do call attention to the fact, which he does not mention, that the private character of this trust is made clear beyond the possibility of doubt by the fact that the paramount purpose of the subscription was to provide benefit for the subscribers and for nobody else. If there were indeed any doubt about the matter at all, that seems to me, on the facts of the present case, to exclude the fund from the class of charitable trusts.

Morton L.J. I am of the same opinion and I have comparatively little to add. In *In re Compton* (2) a recent decision of this court, the Master of the Rolls said : " The fundamental " requirement of a charitable gift is, in my opinion, correctly " stated in the following passage in Tudor on Charities, 5th ed., " p. 11 : ' In the first place it may be laid down as a universal " ' rule that the law recognizes no purpose as charitable unless " ' it is of a public character. That is to say, a purpose must, " ' in order to be charitable, be directed to the benefit of the " ' community or a section of the community '." In the present case I think there are three reasons why it is impossible to decide that the fund in question is held upon a charitable trust. In the first place, the only objects of the trust are employees of a particular company, for it seems to me that, on the true construction of the circular, ex-employees are not included, although I am not suggesting that if ex-employees serving with the Forces had been included, that would in

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any way have altered the position. In the course of the argument of the Attorney-General and Mr. Upjohn *In re Drummond* (1) was criticized, notwithstanding the approval of it indicated by this court in *In re Compton* (2). It was said that any expressions of approval were not necessary for the decision of *In re Compton* (2), and that this court is not bound by them. I desire to say quite plainly that I entirely approve of the decision in *In re Drummond* (1). In considering the numerous cases as to trusts alleged to be directed to the benefit of the community, or of a section of the community, I have often felt inclined to echo the observations of Russell L.J. (as he then was) in *In re Grove-Grady* (3): " I cannot help feeling that in some instances matters have been " stretched in favour of charities almost to bursting point: and " that a decision benevolent to one doubtful charity has too " often been the basis of a subsequent decision still more " benevolent in favour of another." It must have been very doubtful, until this court removed the doubt in the case of *In re Christchurch Inclosure Act* (4), whether a right of cutting turf vested in the occupiers for the time being of a few cottages was of a sufficiently public character to come within the legal definition of a charity. In that case Lindley L.J. said this (5): " Had it not been for the decision of the House of Lords in " *Goodman* v. *Mayor of Saltash* (6) we should have felt great " difficulty in holding this trust to be a charitable trust. For, " although the occupiers of these cottages may have been, and " perhaps were, poor people, the trust is not for the poor " occupiers, but for all the then and future occupiers, whether " poor or not. Moreover, the trust is not for the inhabitants " of a parish or district, but only for some of such persons. " The trust is for a comparatively small and tolerably well-" defined class of persons. The class consists of all the then " and future occupiers of the cottages; and there may be " several occupiers of one cottage. The class, however, " though limited, is as to its members uncertain, and is liable " to fluctuation, and the trust for the class is perpetual. This " being the case, we are unable to distinguish this case from " the trust which both Lord Selborne and Lord Cairns held " to be a charitable trust, and therefore valid, in *Goodman* " v. *Mayor of Saltash.*" (6) Charities are rightly privileged as

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(1) [1914] 2 Ch. 90.

(2) [1945] Ch. 123.

(3) [1929] 1 Ch. 557, 582.

(4) (1888) 38 Ch. D. 520.

(5) Ibid. 530.

(6) 7 App. Cas. 633.

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regards freedom from income tax and freedom from the restrictions imposed by the rule against perpetuities, and it is important that those privileges should really be restricted to purposes which benefit the public or some section of the public. I think *In re Drummond* (1) imposed a very healthy check upon the extension of the legal definition of "charity," and I suspect that if the decision had been the other way it would have been followed by a case in which it would have been argued that, if the provision of holidays for the employees of a large company was a charitable object, so also was the provision of holidays for employees of a partnership firm employing, say, one hundred persons. Next there would have followed an argument that the same would apply in the case of a partnership firm employing eight persons. In the present case, as I have said, the trust is for the employees of a particular company and such a trust is not, in my view, a trust for the benefit of the community, or of a section of the community: see *In re Compton* (2).

In the second place, I think that those eligible to receive benefits were not even all the employees of the particular company. They were those who chose to join in the scheme and to allow twopence a week to be deducted from their wages. That is not expressly stated in the circular, but I think it is clear from its whole tenor that those who were allowing the deduction from their wages were not intending to provide benefits for those who refused to allow any such deduction. As regards the payments which were made to ex-employees serving in the Forces, I only desire to say this. I think that these payments must have been known to a very large proportion of those interested, and it is a significant fact that there was never any protest, so far as we know, against the making of these payments. The only protest arose when those payments were stopped, and the protest came from those at home, who displayed, I think, a very generous spirit in so protesting. It seems to me that the arrangement, initiated by the circular of November, 1940, was a perfectly businesslike arrangement whereby payments were made into a fund which was to be applied for the benefit of the persons making those payments. It is true that, under the circular, no one was given a contractual right to any particular sum but a wide discretion was given to the trustees as to what payments should be made in respect of air raid distress. As my Lord has pointed out, that does not alter the fact that this was

(1) [1914] 2 Ch. 90.

(2) [1945] Ch. 129, 131.

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a businesslike arrangement on the part of the subscribers for their own benefit.

The third point is that there is no element of poverty in the present case. That, of course, does not prevent a trust from coming within the fourth head of Lord Macnaghten's classification in *Pemsel's* case (1), but the relevance of it in the present case is this: where poverty is essential in the qualification for benefits under a particular fund, there have been cases where trusts which would appear to be of a private nature have been held to be charitable. An example of this is the case of *Spiller* v. *Maude* (2), which has been already mentioned. The reason, as was suggested by the Master of the Rolls in *In re Compton* (3), may be that the relief of poverty is regarded as being in itself beneficial to the community. That element being absent in the present case, the appellant cannot rely on these cases. Mr. Upjohn has argued that the provision of relief for air raid distress should be elevated to the same position as trusts for the relief of poverty. No doubt the provision of relief for air raid distress is a most excellent object, and I should not myself doubt that a fund for the relief of air raid distress in Coventry was a fund held upon charitable trusts. But I do not feel inclined to extend the somewhat anomalous line of cases where poverty has been held to take a trust out of the category of a private trust and into the category of a trust which is charitable in the legal sense.

Somervell L.J. I agree.

Appeal dismissed.

Solicitors: *Treasury Solicitor ; Crawley & De Reya ; Edward & Childs.*

(1) [1891] A. C. 531.
(2) 32 Ch. D. 158 *n.*
(3) [1945] Ch. 123.

H. C. G.

In re F. DE JONG & COMPANY LIMITED.

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1946

Mar. 13, 14.

Lord Greene M.R., Morton and Somervell L.JJ.

Company—Winding up—Preference dividends in arrears—Distribution of assets after payment of debts and repayment of preference capital.

A company with a capital of 25,000*l.*, divided into 10,000 preference and 15,000 ordinary shares of 1*l.* each, of which 5,006 preference shares and all the ordinary shares had been issued, passed a resolution for a voluntary winding-up. Article 15 of the company's articles of association provided : " the . . . . preference " shares shall carry the right to a fixed cumulative preferential " dividend at the rate of six per cent. per annum on the capital " for the time being paid up thereon respectively, and shall have " priority as to dividend and capital over the other shares in the " capital for the time being." At the date of the winding-up resolution the preference dividends were in arrears. The debts having been paid and the preference capital repaid :—

Held, that the preference shares had priority over the ordinary shares in respect of the arrears of the preference dividends.

In re Walter Symons, Ld. [1934] Ch. 308, applied.

In re Wood, Skinner & Co. [1944] Ch. 323, distinguished.

APPEAL from Cohen J.

F. de Jong & Co., Ld., was incorporated on December 6, 1905, with the object of carrying on the business of manufacturers and modellers of and dealers in ornamental fibrous plaster and other artistic ceilings, and as wall decorators and designers. The capital of the company was 25,000*l.* divided into 10,000 preference shares of 1*l.* each and 15,000 ordinary shares of 1*l.* each. 5,006 preference shares and all the ordinary shares had been issued and were credited as fully paid. In 1908 the company was converted into a private company. Article 15 of the company's articles of association, after providing as to the division of the capital into ordinary and preference shares, continued " the said preference shares shall carry the right to a " fixed cumulative preferential dividend at the rate of six per cent. " per annum on the capital for the time being paid up thereon " respectively, and shall have priority as to dividend and capital " over the other shares in the capital for the time being, but " shall not carry any further right to participate in the profits " or assets . . . ." The dividends on the preference shares were paid up to June 30, 1940, only. By a special resolution passed on March 30, 1944, it was resolved that the company should be wound up voluntarily and a liquidator was appointed. All the creditors of the company had been paid in full and the capital repaid on the preference shares leaving a balance in hand of 3,370*l.* 0*s.* 5*d.* In these circumstances the liquidator took out a summons to have it determined whether on the true construction of the articles of association of the company the holders of the preference shares were entitled to receive out of the net surplus assets of the company the amount of the arrears of the cumulative preference dividend.

Cohen J. held on the true construction of art. 15 that the holders of the preference shares were entitled to receive out of the surplus assets the arrears of the preference dividends.

One of the ordinary shareholders of the company, William Velloni, appealed. In the course of the argument articles other than art. 15 were referred to but were treated as immaterial.

Maurice Berkeley for the appellant, an ordinary shareholder. It is submitted that the question is purely one of the construction of the articles of association, and that the authorities do not help much. Arrears of dividend are not payable out of assets in a winding up unless the articles or memorandum of association so provide. The word " priority as to dividend " refer to the period when the company is a going concern. On that construction the word " dividend " is given its natural meaning. Dividends are only payable while a company is a going concern and not after a winding up has started: per Stirling L.J., in *In re Crichton's Oil Co.* (1). The word " dividend " should be given its natural meaning unless the court is forced by the context to give it an artificial one: *In re Walter Symons, Ld.* (2). In that case the dividend rights had already been set out in extenso, and the court considered itself forced by the context to read " dividend " in a later phrase as " arrears of dividend." There are no words here which should force the court to give a strained meaning to the word " dividend " in the sentence " priority as to dividend and " capital over the other shares in the capital for the time being." Even the words " priority as to . . . . capital " in that sentence do not necessarily refer to winding up: they may refer, for example, to a reduction and return of capital taking place while the company is still a going concern. The right to a fixed cumulative preference dividend is in its very nature one which can only become effective while the company is a going concern.

The natural construction of all the relevant words in art. 15 is that they cover the whole period of the company's existence, in other words, cover the dividend rights while the company is a going concern and the capital rights both while it is a going concern and in a winding up. *In re Wood, Skinner & Co.* (1) tends to support the above contentions, but the wording of the articles there concerned was admittedly different from the wording under consideration here.

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(1) [1902] 2 Ch. 86, 95.

(2) [1934] Ch. 308.

Divine for the respondent preference shareholder. This is a very old common form of article and it seems strange that its construction should cause so much difficulty. Maugham J., admitted to hesitation in arriving at his decision in *In re Walter Symons, Ld.* (2). In *In re Wood, Skinner & Co., Ld.* (1), Cohen J., distinguished *In re Walter Symons, Ld.* (2) but reached his decision also not without hesitation.

The strength of the argument for the ordinary shareholder here is that if it was intended to give preference shareholders arrears of dividend in a winding up it could have been so stated. But the strength of that argument is removed by the consideration that these articles date from 1905, and that a fixed and settled form for giving that right to arrears of dividend only emerged much later. [He referred to the judgment of Farwell L.J., in *Will* v. *United Lankat Plantations Co.* (3).] Preference was extended later to the repayment of capital, but it was generally understood that the right to participate in surplus assets remained unaffected, though this was not definitely established until *In re William Metcalfe & Sons, Ld.* (4). The next step was to insert words taking away rights of participation in surplus assets, and the modern preference share gives a preference which exhausts the holder's rights. There have been many devices for expressing the rights to attach to preference shares. The present formula is one of the earliest. [Reference was made in connexion with the evolution of the formula to successive editions of Palmer's Company Precedents beginning with the 4th ed. (1888).]

The inference is irresistible from consideration of the history of the formula that draftsmen meant it to apply in toto to winding up and to confer a right to arrears of dividend. Cf. *Will* v. *United Lankat Plantations Co.* (5). [He referred to *In re Crichton's Oil Co.* (6).]

On the wording of art. 15 the priority as to dividend while the company is a going concern is, it is submitted, given by the use of the word "preferential." The subsequent reference to priority as to dividend is therefore a tautology unless it is intended to refer to arrears of dividend in winding up. In *In re Wood, Skinner & Co.* (1) the word "preferential" was absent, and, accordingly, the construction given to the article in that question involved no tautology. [He was stopped.]

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(1) [1944] Ch. 323.
(2) [1934] Ch. 308.
(3) [1912] 2 Ch. 571, 579.
(4) [1933] Ch. 142.
(5) [1912] 2 Ch. 571.
(6) [1901] 2 Ch. 184; (C. A.) [1902] 2 Ch. 86.

Pennycuick for the liquidator.

Berkeley replied.

LORD GREENE M.R. Morton L.J. will deliver the first judgment.

MORTON L.J. stated the facts and continued: The question which we have to determine is stated in the summons accurately as follows: "Whether upon the true construction of "the articles of association of the company the holders of the "preference shares are entitled to receive out of the net surplus "assets of the company a sum equivalent to the amount of the "arrears of the cumulative preferential dividend thereon "accrued since June 30, 1940." Prima facie, and in the absence of words making provision for it in the memorandum and articles of association, cumulative preference dividends are not payable out of the assets in a winding up. It is a question of construction in each case whether the memorandum or articles provide that such arrears of dividend shall be payable in a winding up.

I turn to art. 15. The vital sentence in it falls into three parts and I shall consider each part separately, and then their combined effect. The first part is this: "The said preference shares "shall carry a right to a fixed cumulative preferential dividend "at the rate of six per cent. per annum on the capital for the "time being paid up thereon respectively." That part of the sentence is clear. It is dealing with dividends payable out of the profits of the company, that is, dividends in the true and ordinary sense while the company is a going concern. It is to be noted that the word "preferential" clearly shows that the dividend on those preference shares is to have priority over the dividend on the ordinary shares. The next part of the sentence is: "and shall have priority as to dividend and capital over "the other shares in the capital for the time being." To what does that portion of the sentence refer? To my mind it refers

(1) [1944] Ch. 323.

to the rights in a winding up. I say that for three reasons. First, the provision giving priority as to dividend must, I think, refer to a winding up because the word "preferential" has already established the priority of the preference shareholders as to dividend, while the company is a going concern. Secondly, the words "priority as to . . . . capital" refer naturally to a distribution of the assets in the winding up. It was suggested by Mr. Berkeley, in his excellent argument for the appellant, that those words might refer to a return of capital, or a reduction of capital, while the company was a going concern. But I cannot think it is a natural construction to refer those words to that event. I think the natural construction is that they refer to the time when it is contemplated that the assets will be distributed, that is to say, the winding up. The third reason is that one would expect to find somewhere in the articles provisions dealing, not only with the rights of the preference shareholders as to dividends while the company is a going concern, but also with the rights of the preference shareholders in a winding up. Unless the passage which I have just read deals with those rights in a winding up there is no provision at all informing the preference shareholders what their rights in a winding up are to be. Mr. Berkeley placed some reliance on the words "for the time being," but I do not think they really assist his argument. The words "in the capital for the time "being" refer merely, I think, to the capital at the time when it becomes relevant to consider what are the respective rights of the shareholders inter se.

Further, if that passage refers to a winding up, I think the word "dividend" must mean "arrears of dividend." The prima facie meaning of dividend was thus stated by Stirling L.J. in *In re Crichton's Oil Co.* (1): "A dividend means prima facie "a payment made to the shareholders while the company is a "going concern." But, in the present case, finding, as I do, this word in a passage which refers to a winding up, it seems to me that one must give the meaning of "arrears of dividend" to it; the priority as to dividend in the true sense has been already provided for by the first of the three passages.

I now come to the third passage, "but shall not carry any "further right to participate in the profits or assets." That passage to my mind rounds off the description of the rights of the preference shareholders, and prevents them from having, firstly, any more than their fixed cumulative preferential divi-

(1) [1902] 2 Ch. 86, 95.

dend out of the profits of the company, and, secondly, any more than the arrears of dividend and return of capital in a winding up. In other words, it provides that the preference shareholders are to have no further right to share in the surplus profits while the company is a going concern, or in the surplus assets in a winding up. So read I think that the whole sentence is given a coherent and sensible meaning, and the whole of its provisions are well balanced and result in a comprehensive definition of the rights of the preference shareholders. That was the conclusion at which Cohen J., as he then was, arrived, and I entirely agree with his decision.

We were referred to two recent cases where the wording of the relevant clause in the memorandum bore some resemblance to the article in the present case. I shall refer to them briefly because, as a rule, little assistance is gained from considering provisions in different language when the court is dealing with a question of construction. In *In re Walter Symons, Ld.* (1), which came before Maugham J., as he then was, the relevant clause of the memorandum of association provided: the preference shares " shall confer the right to a fixed cumulative " preferential dividend at the rate of twelve per cent. per annum " on the capital for the time being paid up thereon, and to half " the distributable surplus profits which in respect of each year " shall remain after paying or providing for the payment of a " dividend for such year at the rate of ten per cent. per annum " on the capital for the time being paid up on the ordinary " shares, and shall rank both as regards dividends and capital in " priority to the ordinary shares, but shall not confer the right " to any further participation in profits or assets." Maugham J. came to the conclusion that the word " dividend " in the phrase " shall rank both as regards dividend and capital in priority " to the ordinary shares " was intended to refer to the arrears of dividend in a winding up. It is true that he placed some reliance on the word " rank " in that clause, but his reasoning is, I think, of assistance in the present case. It is to be noted that he found no difficulty in deciding that the word " dividend" in that case meant arrears of dividend. The other case is *In re Wood, Skinner & Co.* (2). In that case Cohen J., on the wording of the article before him, came to the conclusion that the preference shareholders were not entitled to have priority as to arrears of their dividends in a winding up. For my part, I see no reason to differ from either of these decisions. In the latter case the clause in the memorandum of association was as follows: "Such preference shares shall confer the right to a "fixed cumulative dividend"—not, it is to be noted, preferential dividend or preference dividend—"of 6*l*. per cent. "per annum on the capital paid up thereon and shall rank both "as regards dividends and capital in priority to the ordinary "shares with power to increase the capital." In that case it was not necessary for Cohen J. to treat the words "shall rank "both as regards dividends and capital" as conferring priority in respect of the arrears of the cumulative preferential dividend in a winding up, because, up to that point there had been no statement that the preference shareholders were to have a preference dividend. I think that is a point which distinguishes *In re Wood Skinner & Co.* (1) from the present case, in which the court is almost driven to the conclusion that the words "shall have priority as to dividend" must refer to a winding up, since priority as to dividend while the company is a going concern has already been provided for. In my view, this appeal should be dismissed.

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(1) [1934] Ch. 308.

(2) [1944] Ch. 323.

LORD GREENE M.R. I entirely agree, and I cannot add anything.

SOMERVELL L.J. I agree.

Appeal dismissed.

Solicitors: *Leonard Tubbs & Co.*, for the ordinary shareholders and the liquidator; *Gerrish & Foster* for the preference shareholders.

H. C. G.

(1) [1944] Ch. 323.

VAISEY J.
1946
Mar. 15.

In re AMES' SETTLEMENT.

DINWIDDY *v.* AMES.

Settlement—Marriage—Fund settled on usual trusts by husband's father—Trust in default of issue for next of kin of husband—Solemnization of marriage and cohabitation—Income paid to husband—Decree of nullity granted on wife's petition—Resulting trust of settled fund for settlor's representatives—Failure of consideration.

By a marriage settlement made in 1908 the intended husband's father covenanted to pay to the trustees within one year from the solemnization of the marriage the sum of 10,000*l.* to be held upon the usual trusts of a marriage settlement, the husband taking the first life interest. In default of issue who should attain a vested interest the settled funds were to be held in trust for the persons who would have been the next of kin of the husband had he died possessed thereof intestate and without ever having been married. The marriage was solemnized, the money was paid to and invested by the trustees, and the parties lived together until 1926 when a decree of nullity was made on the wife's petition. The settlor died in 1933. The husband continued to receive the income until his death in 1945 :—

Held, that the marriage having been void ab initio, there was a total failure of consideration, and the fund was held on a resulting trust for the settlor's executors.

By a settlement, dated April 27, 1908, reciting that a marriage had been agreed and was intended to be solemnized between John Ames and Miss Hamilton, and that the settlor Louis Eric Ames (the intended husband's father) had agreed to settle 10,000*l.* in the manner thereinafter appearing, the settlor "in pursuance of the said agreement and in consideration of "the said intended marriage" covenanted . . . . "that in "case the intended marriage should be solemnized he would "within one year after the date of solemnization of the said "intended marriage pay to the trustees for the time being of the "settlement the sum of 10,000*l.*" Until payment that sum was to carry interest and the trustees of the fund were to stand possessed of that sum for investment ; to pay the income to John Ames during his life, and, after his death, to pay the income to Miss Hamilton during the residue of her life or until she should marry again. Then followed certain trusts for the issue of the intended marriage.

The ultimate trust was as follows : "If there should not be "any child of the said intended marriage who attains a vested "interest under the trust hereinbefore declared in default of "appointment then subject to the trusts and powers "hereinbefore contained the trust fund and the income and "statutory accumulations (if any) of the income thereof or so "much thereof as shall not have become vested or been applied "under any of the trusts or powers affecting the same shall "after the death of" Miss Hamilton "and such failure of "children as aforesaid be held in trust for the person or persons "who under the statutes for the distribution of the estates of "intestates would have become entitled thereto at his death "if" John Ames "had died possessed thereof intestate "and without ever having been married such persons "if more than one to take as tenants in common in "the shares in which they would have taken under the "same statutes." It was further witnessed that in further pursuance of the agreement and in consideration of the intended marriage the settlor covenanted with the trustees and also separately with the intended husband and the intended wife, that in case the said intended marriage should be solemnized his executors would within six months after his death pay to the trustees of the settlement fund already existing a further sum of 10,000*l.*, which was similarly to carry interest from the due date until payment; and the trusts of that second 10,000*l.* were referentially declared on similar lines to the trusts applicable to the first sum of 10,000*l.*

The ceremony of marriage between John Ames and Miss Hamilton took place on April 28, 1908. Shortly thereafter, the settlor paid the first sum of 10,000*l.* to the trustees of the settlement, who invested it, and the income from those investments was paid to John Ames from then down to the time of his death, and it was now represented by investments of an approximate market value of 9,176*l.* The parties lived together in England for some seven years, and then went to Kenya. There was no issue of their union, and by a decree of the Supreme Court of Kenya at Nairobi, dated July 8, 1926, their marriage was "pronounced and declared to have been and to be "absolutely null and void to all intents and purposes in the "law whatsoever," the ground being the incapacity of the husband to consummate the marriage. That decree was made absolute on January 11, 1927. In 1927 the lady contracted a marriage with a Mr. Giffard, and by a deed, dated November 1, 1927, she, under her new name of Giffard, released all her interests under the settlement.

The settlor made his will on June 28, 1933, and after reciting that he had covenanted to pay 10,000*l.* under the settlement he put his son John to his election and said that he must surrender his interests, which were the only interests then remaining, except those of the hypothetical next-of-kin, if there were such interests, as a condition of taking any benefit under the will. The settlor died on December 3, 1933, and his will was duly proved. On February 20, 1934, John Ames executed a deed by which, in order to comply with the directions in his father's will, he released his father's executors from any obligation in regard to the provision of the second sum of 10,000*l.* John

Ames died on January 20, 1945. The plaintiffs as trustees of the settlement took out this summons asking whether they ought to pay over the settled funds to the first two defendants who claimed under the trust in default of issue or to the representatives of the settlor. No claim was made to the income paid to John Ames during his life.

E. G. Wright for the plaintiffs, two of the trustees of the settlement.

Pascoe Hayward for the next-of-kin of John Ames.

The settlement has not altogether failed, and on the death of John Ames the property passed to his hypothetical next-of-kin in default of issue: *Dormer* v. *Ward* (1), where the court varied a marriage settlement after a decree of nullity. There is no authority for saying that a decree of nullity abrogates all the trusts of a settlement: *Dunbar* v. *Dunbar* (2). The decision in *In re Garnett* (3) is distinguishable on the facts. *In re Wombwell's Settlement* (4); *Dodworth* v. *Dale* (5).

The settlor treated the settlement as valid during his life, and expressly recognized its validity by putting his son to his election by his will, to take under the settlement or under the will.

Rawlence for the personal representatives of the settlor. The settlement has become void, and there is a resulting trust for the settlor's executors. The whole consideration for the settlement has failed. The settlor's executors do not claim a return of the income paid to John Ames during his life, but the question now is what is to be done with the capital. It is not disposed of by the settlement. There is no trust on failure of issue of the marriage, as the marriage was void from the first. The decision in *In re Garnett* (3) covers the present case.

VAISEY J. (having stated the facts) proceeded. I will say at once that the question of a marriage which is not void but voidable is not the least perplexing of the legal principles and hypotheses with which this court is concerned. A marriage which holds good until it is challenged, as it can only be challenged, by one of the parties to it, and the retrospective effect of a decree of nullity declaring the marriage to have been void from the beginning, are ideas which I am bound to say involve some very curious considerations. I only propose to deal with the matter so far as it is in my judgment necessary to do so for the pupose of deciding this case. There are several judicial authorities which have some bearing on and are more or less apposite to the problem which I have now to solve. I will at this stage mention those which have been brought to my notice during the argument. *Dormer* v. *Ward* (1) raised the question of the jurisdiction of the court to vary a marriage settlement under the Matrimonial Causes Acts, not on the occasion of a divorce, but on the occasion of a decree of nullity, and it was held that although the marriage had been declared void and although a certain covenant no longer took effect, the court had jurisdiction under the Act of 1859 to vary the settlement on the application of the petitioner. There, however, the settlor was the respondent husband himself, and I do not propose to consider the somewhat difficult question how far the power to vary can be exercised either in the absence of or contrary to the wishes of a settlor who is not one of the parties to the marriage. Vaughan Williams L.J. in his judgment there said (2): "I do not find that the settlement continued "in force after the decree. In my opinion this settlement did "not do so." That, of course, is a statement which may not be of quite such general application as appears at first sight, but it does state that when the marriage has been annulled the settlement as a marriage settlement must be considered, for some purposes at any rate, to be no longer in existence. *In re Garnett* (3) dealt, in circumstances which were extremely peculiar, with the significance of the word which we have in the present case—"solemnized," and to that extent is of assistance. Kekewich J. who decided it held that a marriage which had been subsequently declared null ab initio had never been "solemnized" in the proper sense of that term: "there "never was a marriage, although the ceremony was gone "through, and the parties lived together as man and wife after "that date. The marriage is pronounced null and void ab "initio. Not only are they not now married, but they never "were." Then he quotes from an earlier case, "'There has "'never been any valid marriage'" and held that money that had been paid in ignorance of the fact that a decree of nullity had been pronounced and made absolute could be recovered. The next case is *Dunbar* v. *Dunbar* (4), to which I need not,

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(1) [1901] P. 20.
(2) [1909] 2 Ch. 639.
(3) (1905) 74 L.J. (Ch.) 570.
(4) [1922] 2 Ch. 298.
(5) [1936] 2 K. B. 503.

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(1) [1901] P. 20.
(2) Ibid. 33.
(3) 74 L. J. (Ch.) 570.
(4) [1909] 2 Ch. 639.

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I think, more particularly refer. There followed the case of *In re Wombwell's Settlement* (1) decided by Russell J. That case turned on the fact that there was in the document an express trust for the settlor, who in that case also was the father of one of the parties, until the intended marriage and thereafter upon trusts appropriate to the usual marriage settlement. There, of course, it was sufficient for the father and his representatives to claim under the express trust in his favour, and the document only became a marriage settlement after the first trust, which was a simple trust for the settlor himself, had come to an end. Here we have no such express preliminary trust, and therefore I do not consider that that decision is of much assistance. The case of *Dodworth* v. *Dale* (2) was a tax case, from which again I do not get very much guidance, though Lawrence J., as he then was, pointed out " that what " has been done during the continuance of the de facto marriage " cannot be undone—cannot be overturned by the operation " of law." Let me say at once that that proposition seems to me to be completely sound provided that there is a proper understanding of what is meant by " what has been done " during the continuance of the de facto marriage " and provided that it is not supposed that that includes things which are not done during the continuance of the marriage but which might flow from things which were done during the continuance of the marriage.

Lastly, there is *In re Eaves* (3). There again it was held that a transaction completed during the time when the husband and the wife continued to be ostensibly man and wife could not be undone when the retrospective decree of nullity was subsequently pronounced. There are some general propositions laid down by Greene M.R., at pp. 114 to 116 of the report which are extremely helpful, but again I cannot see that they have any direct bearing on the present case. This is no question of undoing anything which has been done. I regard the contest as merely this: The plaintiffs hold certain funds in their hands, and they ask to which of the alternative claimants they ought to make those funds over. I think it would not be incorrect to say that the problem is really which of those parties has the better equity. The persons who constitute the hypothetical next-of-kin say " Look at the deed of settlement. We are the " persons there designated to take the fund, and there is no

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(1) [1922] 2 Ch. 298.

(2) [1936] 2 K. B. 503, 519.

(3) [1940] Ch. 109, 114, 116.

" reason why we should not do so," and therefore claim to have the better equity. On the other hand it is said " But that trust, " with the other trusts, were all based on the consideration and " contemplation of a valid marriage, and now that it has been " judicially decided that there never was a marriage that trust " cannot possibly form the foundation of a good equitable " right." The settlor's representatives say that theirs is the better equity because the money was only parted with by their testator on a consideration which was expressed but which in fact completely failed. It seems to me that the claim of the executors of the settlor in this case must succeed. I think that the case is, having regard to the wording of the settlement, a simple case of money paid on a consideration which failed. I do not think that that hypothetical class of next-of-kin (who were only brought in, so to speak, and given an interest in the fund on the basis and footing that there was going to be a valid marriage between John Ames and Miss Hamilton) have really any merits in equity, and I do not see how they can claim under the express terms of a document which, so far as regards the persons with whom the marriage consideration was concerned, has utterly and completely failed. If their claim be good, it is difficult to see at what precise period of time their interest became an interest in possession. But I hold that their claim is not good, and that they have not been able to establish it.

One further point I ought to mention, namely, what effect, if any, the condition in the father's will putting John Ames to his election has on the problem which I am deciding. It is said that by directing the release of the covenant the settlor recognized the settlement as subsisting and must be deemed in some way to have approbated it or confirmed it, and that by so doing he gave rights to the relatives who constitute the class of next-of-kin which they would not otherwise have possessed. I cannot see how that could be so. The father, it is true, did not make any claim to the first 10,000*l.* during his lifetime, as he might well have done; nor did his representatives make any such claim during the life of John Ames. But it may well have been his own intention, so far as the life interest in the sum was concerned, that John Ames should have the benefit of it. However that may be, I do not think there is anything in the will, or in the course of dealing by the father, or his refraining from asserting his rights at an earlier stage, that can operate to defeat the rights which are now asserted by his personal representatives. I therefore declare that, in the events which have

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happened, the trustees ought to pay and transfer the fund in their hand to the two defendants Baron Belhaven and Stenton and Mr. Ellis as executors of the settlor; and the costs of all parties to this application will be taxed as between solicitor and client and paid out of the capital of the fund.

Solicitors: *Frere, Cholmeley & Co.; Lawrence, Graham & Co.; Cunliffe & Airy, for Dickson, Archer & Thorp, Alnwick.*

H. L. L.

WYNN-PARRY J.

1946

Mar. 7.

NETZ *v.* EDE.

Alien—German national—Internment after outbreak of war—Notice of intention to deport to Germany—Action against Home Secretary—Claim to restrain deportation or repatriation—Act of state—Statement of claim struck out as disclosing no cause of action—Leave to apply for liberty to amend—R. S. C. Or. 25, *r.* 4.

A German subject who came to England from Germany in 1931, and started a business here applied for naturalization shortly before the outbreak of war, but the application remained in abeyance. In June, 1940, he was interned, and still remained in an internment camp. In October, 1945, a notice was posted up in the camp under the authority of the Home Secretary giving a list of names of persons whom it was proposed to deport, included in which was the above-named German subject, who commenced an action against the Home Secretary, claiming an injunction to restrain the defendant from so deporting or expelling him. The defendant took out a procedure summons under Or. 25, r. 4, asking that the statement of claim be struck out as disclosing no cause of action:—

Held, that the plaintiff, who claimed to be a German national, became an alien enemy, allowed to remain in England by licence of the Crown, which could be withdrawn at any time. Deportation of an alien enemy would be an act of State, for which no action would lie. The statement of claim must therefore be struck out, but leave would be given to amend it to raise the question whether the plaintiff still remained an alien enemy.

PROCEDURE SUMMONS.

The plaintiff, Johan Adam Netz was a German subject who had settled in England in 1931, and started a business which employed a large number of persons. Shortly before the outbreak of war in 1939 he applied for naturalization, but his application was in abeyance. In June, 1940, he was interned, and

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still remained interned in spite of applications for release. In his statement of claim, in which he described himself as a German national, he alleged that in October, 1945, a notice was posted up by or on behalf of the defendant, the Secretary of State for Home Affairs, containing a list of persons then in the camp whom it was proposed to deport or repatriate to Germany or some other country, and that in that list the plaintiff's name was included. He brought this action against the defendant claiming an injunction to restrain him from deporting, expelling or repatriating the plaintiff from the United Kingdom. He further alleged that such action if taken would cause irreparable injury to him and to his business.

On February 12, 1946, the defendant took out this summons under Or. 25, r. 4, asking that the statement of claim might be struck out on the grounds that it disclosed no reasonable cause of action and was frivolous and vexatious and that the action might be stayed or dismissed.

Danckwerts for the defendant.

The plaintiff's action cannot possibly succeed and the statement of claim should be struck out as vexatious and disclosing no cause of action. The plaintiff claims as a German national, and therefore on the outbreak of war he became and was interned as an alien enemy, who has no right to proceed against the executive, either to regain his liberty by a writ of habeas corpus, or to prevent his expulsion to some other country. *Rex* v. *Vine Street Police Station Superintendent* (1), *Rex* v. *Commandant of Knockaloe Camp* (2). The plaintiff may have applied for naturalization in Britain, but the courts will not recognize any change of nationality during war: *Schaffenius* v. *Goldberg* (3). The plaintiff can remain in this country solely by the licence of the Crown, which may be withdrawn at any time. If withdrawn he has no right to remain and can be sent back to his native country. Therefore any action which he may take, must fail, and the claim should be struck out under Or. 25, r. 4: see *Dyson* v. *Attorney-General* (4).

Ewen E. S. Montague K.C. and *Douglas Lowe* for the plaintiff.

There is nothing before the court at present to show that a proper exercise of prerogative power has taken place, and this is not admitted. The action raises a number of important

(1) [1916] 1 K. B. 268.
(2) (1917) 117 L. T. 627.
(3) [1916] 1 K. B. 284.
(4) [1911] 1 K. B. 410.

points and ought to be allowed to go to trial. All that is at present known is that a list of persons has been put up in an internment camp, stating that they are liable to be sent back to Germany; we do not know who has made the order, or whether it is a lawful exercise of the prerogative. In *Salaman* v. *Secretary of State for India* (1) Fletcher Moulton L.J. gave several examples of an act of State, but no general rule or definition. We do not contest the habeas corpus cases, but there is no authority to prevent the plaintiff objecting to deportation, which would be an irreparable injustice to him, even if it were a valid act. It is contrary to natural justice to deprive any man of his rights without a full hearing of his case and the courts can and should restrain such a misuse of the prerogative.

The following points arise in the case (1.) There is nothing before the court to show that the prerogative has been used correctly or at all; (2.) Until revocation of his licence the plaintiff is in the position of a friendly alien: see *Princess Thurn and Taxis* v. *Moffitt* (2), *Porter* v. *Freudenberg* (3); (3.) Until revocation the plaintiff is under the protection of the Crown; (4.) Even if the defendant can revoke the licence of the plaintiff, the court will restrain him from doing so if such a course is contrary to natural justice; (5.) The court can inquire into the extent of the prerogative claimed, and restrain it if unjustly exercised: see Halsbury's Laws of England, 2nd ed., vol. 6, pp. 444 and 455; (6.) Unless the Home Secretary has considered the special facts of the plaintiff's case and his position here before the war, there has been no proper exercise of the prerogative; (7.) There is no prerogative to deport except in time of war; (8.) This country is not now at war with Germany. A state of war can only exist with another sovereign state, and Germany is no longer a sovereign state; it is merely a certain geographical area governed by the Allied Control Commission. (9.) The plaintiff is not an enemy alien, for that reason and because an enemy alien is someone who owes allegiance to a sovereign or state at war with England: see *Sylvester's* case (4), *Porter* v. *Freudenberg* (3). The plaintiff has no allegiance left to any government at war with England: see *Ex parte Weber* (5); he cannot be deported under the prerogative but by an order made under the Aliens Restrictions

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(1) [1906] 1 K. B. 613, 639, 641.
(2) [1915] 1 Ch. 58.
(3) [1915] 1 K. B. 857.
(4) (1702) 7 Mod. 150.
(5) [1916] 1 A. C. 421.

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Act, 1914. The plaintiff in his statement of claim has put forward a proper case of great importance and it should be given a hearing, and not dismissed on an interlocutory application. Order 25, r. 4, was not intended to apply to such a case as the present: see *Dyson* v. *Attorney-General* (1).

Danckwerts in reply.

I was bound by the plaintiff's pleading that he was a German national, and the application would not have been launched, except for that pleading. There is nothing in that pleading to suggest that the plaintiff has ceased to be a German national, but of course the plaintiff may get leave to amend. The war must be assumed to be still in being, as a public fact.

WYNN-PARRY J., having stated the facts proceeded: The application is made under Or. 25, r. 4, of the Rules of the Supreme Court, and the defendant also invokes the inherent jurisdiction of the court. I think, however, it will be sufficient if I deal with this matter on the first basis. Or. 25, r. 4, is in these terms: "The court or a judge may order any pleading to be "struck out, on the ground that it discloses no reasonable "cause of action or answer, and in any such case or in case of "the action or defence being shown by the pleadings to be "frivolous or vexatious, the court or a judge may order the "action to be stayed or dismissed, or judgment to be entered "accordingly, as may be just."

The jurisdiction given by that rule is a very powerful jurisdiction, and is therefore one to be exercised very sparingly. The principles on which the court is to proceed are stated quite clearly in the authorities, to three of which I will refer. The first is the case of *Republic of Peru* v. *Peruvian Guano Co.* (2), Chitty J. said: "This motion is made under the first branch of "Or. 25, r. 4. There is some difficulty in affixing a precise "meaning to the term 'reasonable cause of action' used in "Or. 25, r. 4. In point of law, and consequently in the view of "a court of justice, every cause of action is a reasonable cause. "But obviously some meaning must be assigned to the term "'reasonable.' Demurrers are abolished, and it could not "have been intended to abolish demurrers by the right hand "and restore them by the left. So far as method of procedure "was concerned, demurrers, certainly in the Court of Chancery, "and in the Chancery Division at the time when these orders

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(1) [1911] 1 K. B. 410.

(2) (1887) 36 Ch. D. 489, 495.

"came into operation, were a cheap and expeditious mode of "obtaining a decision; the mere substitution of a motion or "summons for the demurrer would not be an adequate explana-"tion of Or. 25. Having regard to the terms of r. 4, and to the "decisions on it, I think that this rule is more favourable to the "pleading objected to than the old procedure by demurrer. "Under the new rule the pleading will not be struck out unless "it is demurrable and something worse than demurrable. "If, notwithstanding defects in the pleading, which would have "been fatal on a demurrer, the court sees that a substantial "case is presented, the court should, I think, decline to strike "out that pleading; but when the pleading discloses a case "which the court is satisfied will not succeed, then it should "strike it out and put a summary end to the litigation. What "I have just stated is intended to be not an exhaustive "explanation of the rule, but merely an indication in a general "way of the limits of its meaning." In *Hubbuck & Sons, Ld.* v. *Wilkinson, Heywood & Clark, Ld.* (1), Lord Lindley M.R., delivering the judgment of the Court of Appeal, said: "The "application is made under Or. 25, r. 4. Order 25 abolished "demurrers and substituted a more summary process for "getting rid of pleadings which show no reasonable cause of "action or defence. Two courses are open to a defendant who "wishes to raise the question whether, assuming a statement of "claim to be proved, it entitles the plaintiff to relief. One "method is to raise the question of law as directed by Or. 25, "r. 2; the other is to apply to strike out the statement of claim "under Or. 25, r. 4. The first method is appropriate to cases "requiring argument and careful consideration. The second "and more summary procedure is only appropriate to cases "which are plain and obvious, so that any master or judge can "say at once that the statement of claim as it stands is in-"sufficient, even if proved, to entitle the plaintiff to what he "asks. The use of the expression 'reasonable cause of action' "in r. 4 shows that the summary procedure there introduced is "only intended to be had recourse to in plain and obvious "cases."

Thirdly, in the case of *Dyson* v. *Attorney-General* (2), Fletcher Moulton L.J., made these observations on this rule: "Now it "is unquestionable that, both under the inherent power of the "court and also under a specific rule to that effect made under "the Judicature Act, the court has a right to stop an action at

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(1) [1899] 1 Q. B. 86, 90.

(2) [1911] 1 K. B. 410, 418.

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"this stage if it is wantonly brought without the shadow of an "excuse, so that to permit the action to go through its ordinary "stages up to trial would be to allow the defendant to be vexed "under the form of legal process when there could not at any "stage be any doubt that the action was baseless. But from "this to the summary dismissal of actions, because the judge in "chambers does not think they will be successful in the end, lies "a wide region, and the courts have properly considered that "this power of arresting an action and deciding it without trial "is one to be very sparingly used, and rarely, if ever, excepting "in cases where the action is an abuse of legal procedure. They "have laid down again and again that this process is not "intended to take the place of the old demurrer by which the "defendant challenged the validity of the plaintiff's claim as a "matter of law. Differences of law, just as differences of fact, "are normally to be decided by trial after hearing in court, "and not to be refused a hearing in court by an order of the "judge in chambers. Nothing more clearly indicates this to "be the intention of the rule than the fact that the plaintiff "has no appeal as of right from the decision of the judge at "chambers in the case of such an order as this. So far as the "rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being "brought before a court. To my mind it is evident that our "judicial system would never permit a plaintiff to be 'driven "'from the judgment seat' in this way without any court "having considered his right to be heard, excepting in cases "were the cause of action was obviously and almost incontestably bad."

It will be apparent from those extracts from the authorities that there is thus thrown upon the applicant in this summons a heavy onus, which has been frankly accepted by Mr. Danckwerts, and the question which arises is whether he has discharged that onus.

Three points at once fall for consideration. The first is the status of the plaintiff. For this purpose I must consider the statement of claim, because, in deciding a matter such as this, neither the applicant nor the court can go outside the language of the statement of claim. Paragraph 1 of the statement of claim is as follows: "The plaintiff is a German national who "entered the United Kingdom in the year 1931 with the "intention of permanently residing therein." I pass over para. 2, which, for the purposes of this summons, does not appear to me to be material, and I come to para. 3, the second sentence of which reads: "Shortly before the outbreak of the "present war the plaintiff became eligible to apply and did "in fact apply for naturalization as a British subject but the "formalities connected with the said application could not be "completed prior to the said outbreak of war"—that is the present war with Germany—"and the said application had to "remain and still remains in abeyance." In para. 4 the plaintiff pleads that in or about the month of June, 1940, he was interned. He says that he has remained interned ever since the said date "despite his applications for release and the "grounds for such continued internment have never been "vouchsafed to him. As far as the plaintiff is aware no just "or adequate grounds for such continued internment exist." I may observe in passing that no relief is claimed in respect of the matters pleaded in that paragraph. Then in para. 5 he pleads: "At or about the beginning of October, 1945, without "any or any previous notice to the plaintiff his name was "included in a notice which was posted by or on behalf of the "defendant upon a notice board in the internment camp where "the plaintiff then was as being a person whom the defendant "intended to repatriate to Germany or concerning whom the "defendant had ordered the repatriation on the 28th October, "1945. (6.) The said notice did not state the ground or grounds "upon which the defendant was acting or purporting to act "as alleged in para. 5 hereof and the defendant has refused and "refuses to state upon what (if any) ground or grounds he acted "or purported to act as aforesaid." Then, in para. 7, there is a plea that the acts of the defendant are ultra vires or, alternatively, a misuse of executive power. "Alternatively the "defendant acted as aforesaid upon no or no sufficient ground. "In the further alternative the defendant has failed to state the "ground or grounds (if any) upon which he in fact acted as "aforesaid." Then he says: "In the further alternative by "reason of the premises if the defendant be permitted to carry "out his aforesaid intention to repatriate the plaintiff and, or "alternatively, if any order made by the defendant for the "repatriation of the plaintiff be allowed to stand the plaintiff "will suffer without any justification a serious and irreparable "injury both to his person and in his aforesaid business." On that he claims the injunction to which I referred when referring to the writ of summons.

For the purpose of considering what the status of the plaintiff is, the two material allegations are, first, that he is a German national, and, secondly, that he was still a German national when the war broke out. Upon those two allegations as they stand, in my judgment I must come to the conclusion that the plaintiff, at the outbreak of war, became an alien enemy, and still is an alien enemy. I was urged by Mr. Montagu to say I ought not to decide this question on this application, but that it was one that should be reserved for the trial, and in the course of his very persuasive argument he invited me to take the view that there was ample material for canvassing the question of the plaintiff's status at the trial. Further he said, that there was no obligation upon him to plead anything in the statement of claim to the effect that as a fact the plaintiff has ceased to be a German national. I do not accept that submission. I am bound, just as Mr. Danckwerts is bound, by the pleading as it stands, and on the pleading as it stands I have come to the conclusion that the plaintiff is at present an alien enemy. There is nothing in this statement of claim to suggest that the plaintiff's status has changed, either by reason of a termination of the war with Germany or by reason of any other fact. I therefore proceed upon the basis that the plaintiff is an ① alien enemy.

The second point which must be noted is, that the defendant is sued in his official capacity. He is described in the title to the action as the Right Honourable Chuter Ede, P.C., His ② Majesty's Secretary of State for Home Affairs.

Thirdly, it is important to consider what is the nature of the complaint which is made by the plaintiff in his statement of ③ claim. I have read the statement of claim earlier in this judgment, and I can therefore refer quite shortly to certain passages in it. The gist of his complaint is in par. 5, that in October of last year the plaintiff's name was included in a notice "posted by or on behalf of the defendant upon a "notice board in the Internment Camp where the plaintiff then "was as being a person whom the defendant intended to "repatriate to Germany or concerning whom the defendant "had ordered the repatriation." It is on that allegation that the plaintiff founds his claim to the relief and injunction restraining the defendant, his servants and agents, from carrying out that intention, namely, to deport, expel or repatriate the plaintiff from the United Kingdom.

In my judgment, on the true view of this statement of claim, the plaintiff is complaining that the defendant, acting in his

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official capacity, intends to cause the deportation of the plaintiff, and the plaintiff challenges the right of the defendant, acting in his official capacity, to do so. On that view a number of important questions arise. The first is, what is the nature ① of the act complained of? Is it an act of State? An act of State, as was said by Fletcher Moulton L.J., in *Salaman* v. *Secretary of State for India* (1), is essentially an exercise of sovereign power. In my view, the act complained of here is an ③ act of State. Secondly, on that view must be considered what consequences flow from the circumstance that the act complained of is an act of State. Assuming that the act complained of was a valid exercise of the prerogative, the result is in law that it cannot be challenged in this court. For that proposition I refer to what was said by Fletcher Moulton L.J., in *Salaman* v. *Secretary of State for India* (2): "An act of State is essentially an exercise of sovereign power, "and hence cannot be challenged, controlled, or interfered with "by municipal courts. Its sanction is not that of law, but that "of sovereign power, and, whatever it be, municipal courts "must accept it, as it is, without question. But it may, and "often must, be part of their duty to take cognizance of it. "For instance, if an act is relied upon as being an act of State "and as thus affording an answer to claims made by a subject, "the courts must decide whether it was in truth an act of "State, and what was its nature and extent." Further on he says (3): "The true view of an act of State appears to me to "be that it is a catastrophic change, constituting a new "departure. Municipal law has nothing to do with the act "of change by which this new departure is effected. Its duty "is simply to accept the new departure; and its power and its "duty to adjudicate upon, and enforce rights of individuals, "or of the Government in the future, appear to me to be "precisely the same whether the origin of such rights be an "act of State or not. But, although this be so, it must not be "supposed that the principles of interpretation applicable to "an act of State are the same as those which apply to other "acts. For instance, if an act of State be expressed in a "document purporting to confer benefits on an individual, it "by no means necessarily follows that there is any intention to "create a contract, or that the document should be construed "by the same canons of interpretation as would be adopted in

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(1) [1906] 1 K. B. 613, 639.

(2) Ibid. 639.

(3) Ibid. 640.

"the case of a contract between two individuals. A Government in the exercise of its sovereign power may well desire to "reserve to itself discretionary powers quite inconsistent with "contractual relations. There is no presumption in the case "of an act of State that this is not the case, and, if the language "of the document and the circumstances of the case point to "such a conclusion, the court is bound to accept it, however "vague and indefinite it may make the effect of the act of "State." In between those two passages Fletcher Moulton L.J. gave a number of examples, and it was sought to be argued by Mr. Montagu for the plaintiff that when those examples are considered and analysed, they indicate that Fletcher Moulton L.J., in the two passages I have read, was not intending to lay down an absolutely general view as to what was the nature, effect and extent of an act of State. I do not, for myself, accept that view. In my view Fletcher Moulton L.J. was intending to state a view as to the nature, extent and effect of an act of State in completely general terms and of general application.

It is on the basis that that is the true nature of an act of State that the judgments are rested, in the cases which decided that an alien enemy who is interned cannot apply for a writ of habeas corpus. In *Rex* v. *Superintendent of Vine Street Police Station. Ex parte Liebmann* (1), it was said by Low J.: "It was alleged on behalf of the Crown (1.) that the applicant "is an alien enemy; (2.) that he is a prisoner of war; (3.) that "the Crown is entitled in exercise of its prerogative to imprison "an alien enemy, and that this court has no jurisdiction to "interfere with the exercise of such prerogative." His Lordship decided each of these questions in favour of the Crown, and as to the third point said (2): "With regard to the third "question, as to the prerogative of the Crown to arrest an "alien enemy, I have really answered almost as much of it as is "necessary to deal with the present case when I have been "dealing with question 2. I have no doubt at all that such "action is quite within the Crown's prerogative. At common "law an alien enemy had no rights, see *Sylvester's* case (3), "and he could be seized and imprisoned and could have no "advantage of the law of England. This position, however, "has been softened by custom and by decision of the courts, "and the judgment of Sargant J. in *Princess Thurn and Taxis*

(1) [1916] 1 K. B. 268, 277.
(2) Ibid. 278.
(3) 7 Mod. 150.

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" v. *Moffitt* (1) approved by the Court of Appeal in *Porter* v. " *Freudenberg* (2), shows that an alien enemy registered under " the Aliens Restriction Act, 1914, as this applicant is, is " entitled to sue in the King's Courts (which would, I suppose, " include such an application as the present) as he is resident " here by tacit permission of the Crown, and so is sub protectione " Domini Regis. He is, therefore, in a similar position to an " alien enemy resident here under licence from the Crown. " That licence, however, can be terminated at any time by the " Crown." In the case of *Rex* v. *Commandant of Knockaloe Camp. Ex parte Forman* (3), Avory J. said: " I have only " one other word to add on the contention put forward by " Mr. Powell that the prerogative of the Crown, which he does " not dispute, to imprison alien enemies as prisoners of war has " been curtailed or restricted by the operation of the Aliens " Restriction Act, 1914. Mr. Powell read it as if its title was " 'The Prerogative Restriction Act, 1914.' But it is not. " It is the Aliens Restriction Act, and it is expressly provided " in the sub-section which my Lord has already read, that any " powers given under s. 1 of the Act, which section is practically " the whole of the statute, or under any Order in Council, " 'shall be in addition to, and not in derogation of, any other " 'powers with respect to the expulsion of aliens, or the " 'prohibition of aliens from entering the United Kingdom, or " 'any other powers of His Majesty.' I am quite unable to " read that as Mr. Powell suggests in the light of the doctrine " of ejusdem generis. I think that the words 'any other " 'powers of His Majesty' must clearly include other powers " besides those with respect to expulsion or prohibition of " aliens from entering the United Kingdom."

The next point I have to consider is this. It is quite true, as Mr. Montagu submitted, that the court is entitled to inquire, and is bound to inquire, into the question whether or not the act complained of is an act within the prerogative. For that proposition I was referred to Halsbury's Laws of England, vol. 6, p. 444, para. 512: " The prerogative is thus created " and limited by the common law, and the Sovereign can claim " no prerogatives except such as the law allows, nor such as are " contary to Magna Carta, or any other statute, or to the " liberties of the subject. The courts have jurisdiction, " therefore, to inquire into the existence or extent of any alleged

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(1) (1914) 31 T. L. R. 24.

(2) [1915] 1 K. B. 857.

(3) 117 L. T. 627, 631.

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"prerogative." That statement, with which I understand Mr. Danckwerts has no quarrel, I accept as an accurate statement of the position. I pass, therefore, to the next question: Is the act complained of here an act within the prerogative, bearing in mind my finding that, as the pleading stands, I must treat the plaintiff as an alien enemy? As an alien enemy he is, as has been seen from the authorities, here under licence. It is clearly part of the Royal Prerogative to allow a person who is an alien enemy to enter and remain in the kingdom. That, I think, clearly appears from the judgment of Lord Reading C.J. in the case of *Porter* v. *Freudenberg* (1) which I need not read.

It is true that, while the licence continues, the alien concerned can sue a subject of the Crown to protect his property. That clearly appears from the case of *Schaffenius* v. *Goldberg* (2), to which I need not refer in detail, but, as is shown by this same case, which is only one example of the well-established proposition, the licence may be withdrawn at any time. It is true that, differing from the earlier view of Low J., it was held that internment is not a revocation of the licence, but I am satisfied on the authorities that there is no doubt that the Crown has the right to withdraw the licence at any time. Apart from authority, it appears to me to be plain that, as the Crown can license an alien enemy either to enter or remain in the kingdom, a fortiori it can withdraw the licence and order such a person to leave the kingdom. That was clearly the view, I think, of Avory J., as is shown in the passage of his judgment in *Rex* v. *Commandant of Knockaloe Camp* (3), which I quoted earlier. It also appears to me to be the basis of the judgment of the Privy Council in the case of *Attorney-General for Canada* v. *Cain* (4), to which I need not refer in detail. Indeed, it appears to me that expulsion of an alien enemy may be regarded as a lesser exercise of sovereign power than the internment of such a person. In the latter case the individual is deprived of his liberty, whereas in the former he retains his liberty and is under no greater disability than that which follows from the absence of licence or permission to enter or remain within the Kingdom.

Bearing in mind all these considerations, I now have to ask myself the question: Has the defendant discharged the admittedly heavy onus cast upon him by the first principle which emerges from the first three cases to which I have referred

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(1) [1915] 1 K. B. 857, 869.

(2) [1916] 1 K. B. 284.

(3) 117 L. T. 627.

(4) [1906] A. C. 542.

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and particularly the case of *Dyson* v. *Attorney-General* (1). I was pressed by Mr. Montagu, on the authority of that case, to allow the matter to go to trial, on the ground that the case raises a question of public importance and that it cannot conveniently be sufficiently canvassed on this occasion. I agree that it raises a question of public importance. That, of itself, is not a decisive reason for refusing to exercise my jurisdiction at this stage. In my judgment, holding the view that I do that on the statement of claim as it stands the plaintiff must be regarded as an alien enemy, I have no alternative but to take the view that there cannot be at any stage any doubt that this action cannot possibly succeed. In those circumstances I propose to accede to the defendant's application, and to order that the statement of claim be struck out, subject to any application which Mr. Montagu may make for leave to amend. This course has been followed in a previous case, it is not objected to by Mr. Danckwerts on behalf of the defendant, and as the matter is so vital to the plaintiff, if such an application is made, I shall be prepared to accede to it. The form of order will be: No order on the summons, except that the plaintiff is to have leave to apply to amend his statement of claim; if no application is made within fourteen days, or the statement of claim is not amended it will then be struck out and the action dismissed with costs, the plaintiff to pay the costs of the summons in any event.

Solicitors: *The Treasury Solicitor*; *W. J. Stoffel, Catford.*

H. L. L.

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(1) [1911] 1 K. B. 410.

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Feb. 28; *Mar.* 1.

TWYFORD *v.* MANCHESTER CORPORATION.

Local authority—Burial ground—Inscriptions on stones or monuments—Fees for cleaning, re-gilding and re-painting—"Monumental "inscription"—Voluntary payment of fees under protest—Payment in discharge of claim not due—Recoverability—Burial Act, 1852 (15 & 16 *Vict., c.* 85), *s.* 34.

Section 34 of the Burial Act, 1852 provides: "Every burial "board under this Act shall and may . . . . fix and settle and "receive such fees and payments in respect of any interment in "any burial ground provided by such board as they shall think "fit, and also the . . . . right of erecting and placing any "monument, gravestone, tablet or monumental inscription in "such burial ground . . . ."

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The defendant corporation owned a cemetery and charged fees for permission to cut, re-cut, re-paint or re-gild inscriptions on stones or monuments therein. The plaintiff, who was a monumental mason, repeatedly went to the cemetery to do work of that nature, and was charged the fees appropriate to each occasion, which were collected from him by the registrar of the cemetery and which he paid under protest. In an action by the plaintiff for a declaration that the defendant corporation was not entitled to make the charges, and for recovery of the amounts which he had paid:—

Held, (1.) that in s. 34 "monumental inscription" means an inscription on a monument and does not mean an inscribed monument and therefore the corporation could lawfully charge a fee for permission to cut inscriptions, and (2.) that the corporation was not entitled to charge fees for permission to re-cut, re-paint and re-gild inscriptions, but the plaintiff could not recover back the amounts which, in respect of charges for doing that work, he had paid, as the payments were voluntary.

William Whiteley, Ld. v. *Rex* (1909) 101 L. T. 741 and *Slater* v. *Burnley Corporation* (1888) 59 L. T. 636, considered and applied.

WITNESS ACTION.

The plaintiff was a monumental mason, and the defendant corporation had a settled table of fees and charges in relation to that one of its cemeteries with which this action was concerned. Those fees and charges were (inter alia) for permission to cut, re-cut, re-paint or re-gild inscriptions on stones or monuments. From time to time the plaintiff, on the instructions and on behalf of owners of memorial stones or monuments in the cemetery, applied for permission to cut, re-cut, re-paint or re-gild inscriptions on those memorial stones or monuments, and was charged fees of small amounts in respect of that work. On each occasion he produced to the registrar of the cemetery the authority of the grave-owner for doing the work. He paid the fees under protest, receiving each time a receipt from the registrar. This took place often throughout a period of about six years, others as well as the plaintiff making like payments, also under protest. In this action, the writ in which was issued on January 21, 1944, the plaintiff claimed a declaration that the corporation was not entitled to impose, demand or enforce payment of any fee or charge in respect of the granting by it of permission for the cutting, re-cutting, re-gilding or re-painting of the inscriptions.

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Shortly after writ issued, the corporation undertook to the plaintiff's solicitors that it would not make any charge against anyone for permission to re-cut, re-paint or re-gild inscriptions on stones or monuments, but it refused an undertaking not to charge for permission to cut those inscriptions, and in the action claimed that its charge for cutting inscriptions was valid and within its powers under the Burial Act, 1852.

Neville Gray K.C. and *George Maddocks* for the plaintiff. In both s. 34 and s. 38, " monumental inscription " means any monument with an inscription on it, not simply the inscription (1). The corporation is therefore not entitled to charge fees in respect of cutting, any more than it is entitled to charge fees in respect of re-cutting, re-gilding or re-painting inscriptions, which it now admits to be illegal. Those acts do not come within " erecting and placing any monument grave-" stone, tablet or monumental inscription," and it is only in respect of permission for doing that that it is entitled to fees. All the fees which the plaintiff paid he paid under protest and he can recover them back: *Somes* v. *British Empire Shipping Co.* (2).

Jennings K.C. and *Wilfrid Hunt* for the corporation. " Monumental inscription " means, not an inscribed monument, but an inscription appertaining to a memorial to the dead, that is to say simply the inscription by itself, not the monument as well. It must follow that the corporation is entitled to charge fees for permission to cut inscriptions on, for example, monuments, gravestones or tablets which are already on graves in which subsequent interments are made. It is not now contended that the corporation is entitled to charge for re-cutting, re-gilding, re-painting or cleaning. Cutting, however, comes within " . . . . placing any . . . . monumental " inscription " and the corporation is entitled to charge for permission to do it. The plaintiff cannot recover back the fees which he has paid in respect of cleaning, re-gilding and re-painting, although the corporation was not entitled to charge them. True, he protested when he paid them, but he paid them quite voluntarily, and the registrar did not threaten him with any untoward consequences should he not pay them. [They referred to *William Whiteley, Ld.* v. *Rex* (1) and *Slater* v. *Burnley Corporation* (2).] In *Somes* v. *British Empire Shipping Co.* (3) the owner had to pay to the shipwright what he demanded in order to get his ship back. In the present case there was nothing of that kind. All that happened was that the registrar of the cemetery demanded the money. There was no duress.

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(1) By s. 38: " The general " management, regulation and " control of the burial grounds " provided under this Act shall, " subject to the provisions of this " Act and the regulations to be " made thereunder, be vested in " and exercised by the respective " burial boards providing the " same ; provided that any " question which shall arise touch-" ing the fitness of any monu-" mental inscription placed in any " part of the consecrated portions " of such grounds shall be deter-" mined by the Bishop of the " Diocese."

(2) (1860) 8 H. L. C. 338.

ROMER J. The question is whether the corporation can or cannot demand fees from people like the plaintiff for permission to cut inscriptions on gravestones, monuments and the like. The point arises principally in such cases as those where a gravestone is erected in the burial ground bearing a suitable inscription and leaving a space to which can be added further inscriptions to commemorate members of the same family who die subsequently. The answer depends entirely on the true construction of s. 34. It was contended for the corporation that the words " monumental inscription " in that section mean an inscription which appertains to a memorial to the dead, that is to say, an inscription on a monument—that they do not mean an inscribed monument. If, as is contended for the plaintiff, they do mean an inscribed monument, clearly the corporation cannot charge for permission to cut inscriptions on stones because, on that view, they could charge a fee only for the right to erect and place a tangible memorial. If, however, the contention for the corporation is correct, the corporation is entitled to charge for the right to cut an inscription.

Had s. 34 stood alone, I might have held that " monumental " inscription " there means something of the same nature as a monument, gravestone or tablet, namely, something solid which, while not fairly describable as a monument, gravestone or tablet, is yet something erected for a purpose which is the same as that for which monuments, gravestones or tablets are erected and placed in burial grounds. Certainly " erecting and " placing " in a burial ground more aptly suggests something solid and tangible rather than a mere inscription. Also, it is to be expected that, when three different kinds of the same

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(1) (1909) 101 L. T. 741.

(2) (1888) 59 L. T. 636.

(3) 8 H. L. C. 338.

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genus precede the word "or," that which follows the word "or" is also a different kind of the same genus. Had s. 34 stood by itself, I should have been inclined to hold that that was its true construction and that the words "monument, "gravestone, tablet" do not exhaustively enumerate all things of that kind which normally can be or are found in burial grounds, but that there may be other like things which were intended to come within the words "or monumental "inscription." Even construing s. 34 by itself, however, the matter might still have been doubtful. The word "inscrip-"tion" may well be considered the leading and more significant of the words "monumental inscription" and it might have been thought to be the intention of the draftsman, having enumerated the three tangible objects generally associated with burial grounds, to turn his attention to "inscription" as distinct from that on which inscriptions are placed.

On the other hand, the words "monumental inscription" in s. 38 certainly cannot mean inscribed monument. If they did, it would follow that the bishop of the diocese had a discretion with regard to one of four different kinds of tangible memorial. If "monumental inscription" in s. 34 does mean one of four different kinds of tangible memorial, it must have the same meaning in s. 38, with the remarkable result that the bishop may declare his views on one of four different kinds of memorial —and that the least common of all the four—but cannot declare his views on monuments, gravestones or tablets. That view is untenable. In s. 38, in my judgment, "monumental in-"scription" means an inscription appertaining to a memorial to the dead and it is the fitness of an inscription of that kind that the bishop has the right to determine. In s. 38 the emphasis is not on "monumental" but on "inscription," which, as, in s. 38, it means an inscription appertaining to a memorial to the dead, must, on ordinary principles of construction, have the same meaning in s. 34. For the plaintiff, it was suggested that, in both sections, "monumental inscrip-"tion" is used widely and generally as embracing the totality of tangible memorial. In my judgment that is not the true construction. Section 34 is not elegantly drawn, but I conclude that "monumental inscription" there means an inscription appertaining to a memorial to the dead, as was contended for the corporation. It follows that the corporation justifiably demanded and the plaintiff properly paid the fees for cutting.

On the other hand, it is clear that the corporation never had the right to demand fees for re-cutting, re-gilding and re-painting. The language of s. 34 would have to be twisted to an unpermissible degree to arrive at the conclusion that it covers such a charge. The registrar of the cemetery had, therefore, no right to demand that charge on the corporation's behalf.

It is contended for the plaintiff that he can recover the small sums that he paid in respect of that charge: *Somes* v. *British Empire Shipping Co.* (1). The plaintiff, however, did not suggest in evidence that the registrar threatened that, unless he paid, he would be excluded from the buial ground in future, or that any other unpleasant result would follow. The position in the present case is very different from that in *Somes* v. *British Empire Shipping Co.* (1). There, the shipwright had the ship and refused to give it to the shipowner unless he paid the sum alleged to be due and the shipowner protested and paid. In the present case there were no threats. There was simply a demand and the plaintiff paid under protest although he believed that he was not liable.

William Whiteley, Ld. v. *Rex* (2) and *Slater* v. *Burnley Corporation* (3) are both much nearer to the present case. In the first case, in which William Whiteley, Ld., had been persuaded to make payments on the footing that certain of their employees were taxable as male servants, and had each time protested in writing, the Divisional Court held that the employees in question were not male servants within the meaning of the Act. Their subsequent claim to recover the payments which they had made was, however, rejected by Walton J., who treated the case as one of payment under a mistake of law. I should myself have doubted whether it was a true case of money paid under a mistake of law, because William Whiteley, Ld., on their view of the law, were not liable to pay it and, indeed, said so. Even so, however, I respectfully agree with the rest of Walton J.'s judgment, particularly with his statement that a general rule applies, namely, the rule that, if money is paid voluntarily, without compulsion, extortion, or undue influence, without fraud by the person to whom it is paid and with full knowledge of all the facts, it cannot be recovered, although paid without consideration, or in discharge of a claim which was not due or which might have been successfully resisted. In my judgment that covers the present case in which, having regard to the evidence, the principle of duress colore officii cannot prevail.

(1) 8 H. L. C. 338.
(2) 101 L.T. 741.
(3) 59 L. T. 636.

ROMER J.

1946

TWYFORD v. MANCHESTER CORPORATION.

In *Slater* v. *Burnley Corporation* (1) the defendant corporation demanded water rate and the plaintiff paid it, the sum paid being more than the corporation were properly entitled to charge. The corporation could cut off the water on non-payment but had not done so or threatened to do so and had not taken legal proceedings to recover the rate. The county court judge held that, as the corporation could cut off the water, the payment was compulsory, and gave judgment for the plaintiff. The Divisional Court held that it was voluntary and could not be recovered back, and Wills J. said that there was no duress, but that the case was simply the ordinary one of a person raising a contention when a demand was made on him. That is precisely the position in the present case, and the plaintiff is not entitled to recover back the sums which, voluntarily though under protest, he paid to the registrar of the cemetery. If he wished to challenge the validity of the registrar's demand, his best course was to refuse to pay and to test the matter by inviting the corporation to sue him. The circumstances in which he made the payments show that he made them voluntarily within the meaning of that word in the cases to which I have referred and these cases demonstrate that his having made them under protest does not help him to recover them back. I cannot make the declaration for which the plaintiff asks, nor can I order repayment of the sums which he claims in respect of fees other than fees for cutting. The action is dismissed with costs, to be taxed as between solicitor and client.

Solicitors: *Edwin Coe & Calder Woods, for Richard Higham & Co., Manchester; Sharpe, Pritchard & Co., for R. H. Adcock, Manchester.*

(1) 59 L. T. 636.

K. R. A. H.

ROXBURGH J.

1946

Feb. 27, 28; *Mar.* 1.

VICTOR BATTERY COMPANY, LIMITED *v.* CURRY'S LIMITED AND OTHERS.

Company—Purchase of share capital—Loan to enable purchaser to complete—Debenture issued by company to nominee of lender—Validity of debenture—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 45, *sub-ss.* 1, 3.

Section 45, sub-s. 1, of the Companies Act, 1929, provides: ". . . . it shall not be lawful for a company to give, whether "directly or indirectly, and whether by means of a loan, guarantee, "the provision of security or otherwise, any financial assistance "for the purpose of or in connexion with a purchase made or to "be made by any person of any shares in the company . . . ."

Sub-section 3 provides: "If a company acts in contravention "of this section, the company and every officer of the company "who is in default shall be liable to a fine not exceeding one "hundred pounds . . . ."

J., a director of and principal shareholder in B. Company and P. Company, agreed to buy for 15,000*l.* the plaintiff company's issued share capital. He could himself pay in cash only 6,000*l.* The defendant company was willing to help him to complete the purchase by lending to B. Company 6,000*l.*, to P. Company 2,000*l.* and to the plaintiff company 2,000*l.* out of which the balance of the purchase money was to be provided. The purchase was completed and the plaintiff company issued a debenture for 10,000*l.* to a nominee of the defendant company. Later, a receiver was appointed by the debenture holder out of court and the plaintiff company subsequently brought an action for a declaration that the debenture was void and of no effect, as having been issued in contravention of s. 45, and for various injunctions against the receiver:—

Held, in dismissing the action, (1.) that the word "security" in s. 45, sub-s. 1, means "valid security" and that the section punishes the borrowing company on the footing that the security provided was and remains valid; (2.) that, even assuming that the debenture was an illegal contract, the plaintiff company was not a person for whose protection the illegality had been created by statute so that there could be relief from it, and that that rule applied which is expressed in the maxim "in pari delicto potior est conditio "defendentis."

Observations of Lord Greene M.R., in *In re V. G. M. Holdings, Ld.* [1942] Ch. 235, at p. 239 considered and applied.

WITNESS ACTION.

On May 27, 1943, a Mr. Jaina agreed to buy from certain vendors for 15,000*l.* the issued share capital of Victor Battery Co., Ld. (hereinafter called "the plaintiff company"). He was a director of and principal shareholder in the British Lion Battery Co., Ld. and Princely Battery Co., Ld. (hereinafter respectively called "British Lion Company" and "Princely "Company"). He could himself pay in cash only 6,000*l.* of the 15,000*l.* which he agreed to pay for the plaintiff company's share capital. He paid the 6,000*l.* down and obtained transfers of forty per cent. of the issued share capital. Curry's, Ld. (hereinafter called "the defendant company") was willing to give him financial assistance to complete the purchase on the terms of an agreement dated August 31, 1943, which was not put in evidence. A clerk to the defendant company's solicitors then went, accompanied by Mr. Jaina and his solicitor, to the bank at which British Lion Company and Princely Company had accounts. He had with him three banker's drafts from the defendant company—one for 6,000*l.* in favour of British Lion Company, one for 2,000*l.* in favour of Princely Company, and one for 2,000*l.* in favour of the plaintiff company. Mr. Jaina paid the draft for 6,000*l.* into British Lion Company's account and that for 2,000*l.* in favour of Princely Company into Princely Company's account. He then procured from that bank a banker's draft for 9,000*l.*, which was debited as to 6,000*l.* to British Lion Company and as to 3,000*l.* to Princely Company, Princely Company being allowed to overdraw for the purpose. That overdraft Mr. Jaina secured by depositing the draft for 2,000*l.* in favour of the plaintiff company. That deposit he had no authority from the plaintiff company to make. The parties then went to the office of the solicitors to the vendors. The draft for 9,000*l.* was handed to the vendors, who executed transfers in blank of the remaining sixty per cent. of the plaintiff company's capital. The transfers were handed to the defendant company's solicitors' clerk, to be held by the defendant company as security. On September 2, 1943, the plaintiff company opened a new account and paid into it the draft for 2,000*l.* On the next day it paid 1,250*l.* to Mr. Jaina, and he paid about 1,000*l.* to Princely Company. Subsequently, Mr. Jaina procured the resolutions necessary for the issue of a debenture, which was sealed on October 5, 1943. It was issued to a nominee of the defendant company, and by it the plaintiff company covenanted to pay a sum of 10,000*l.* and interest, and charged its assets to secure such payment. Later a receiver was appointed by the debenture holder out of court and the plaintiff company subsequently brought an action for a declaration that the debenture was void and of no effect, as having been issued in contravention of s. 45, and for various injunctions against the receiver. It was not alleged that the debenture was ultra vires the plaintiff company.

Slade K.C., *Lindner* and *Settle* for the plaintiff company. The plaintiff company has broken the law by issuing the debenture, which is therefore invalid and unenforceable: *Victorian Daylesford Syndicate, Ld.* v. *Dott* (1), *Bonnard* v. *Dott* (2). There is no distinction between " giving financial assistance by giving

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(1) [1905] 2 Ch. 624. (2) [1906] 1 Ch. 740.

"security" and "giving security to render financial assistance." The point is that a company must not get into a position in which it is buying its own shares, which is what the plaintiff company appears to have done in this case. The defendants knew that what was done was unlawful. Therefore, on the true construction of s. 45 in accordance with well-settled principles, the debenture must be unenforceable, notwithstanding that one result is that while the plaintiff company, which issued it, cannot be fined more than 100*l.*, the debenture holder must lose the whole amount covered by the debenture. That must happen in every such case, even though the purchase price of the shares be as little as 50*l.* and the amount of the loan be 100,000*l.* or more. [They referred to Maxwell on the Interpretation of Statutes, 8th ed., pp. 330, 331.] "Security" in s. 45, sub-s. 1, does not, prima facie, mean either valid or invalid security, but is neutral. Since, however "it shall not be lawful for a "company to give . . . . financial assistance," any security by means of which it does so must be unlawful and therefore invalid. That rule, therefore, prima facie applies which is expressed in the maxim "in pari delicto potior est conditio "defendentis" and which is elucidated in Anson on Contracts, 19th ed., at pp. 238–239. There are, however, exceptions to the rule. One of them is stated by Parker J. in *Lodge* v. *National Union Investment Co.* (1). It is that a person may be relieved of a contract into which he has entered and which is made illegal by statute in the interests of a particular class of persons, if he is one of that particular class of persons. True, only the company is penalized by s. 45 for the offence which has been committed, but it is none the less one of that particular class of persons for whose protection this kind of contract was made illegal.

Valentine Holmes K.C. and *Heckscher* for the defendants. The section has been infringed, but the security is not thereby avoided. The section does not provide either that it shall not be lawful to accept security for a loan or that the security provided shall be void. For the plaintiff company, it is sought to surmount that by contending, in effect, that the defendant company has acted illegally by accepting the security—although it is not expressly made illegal to do so—and that the transaction consisting of the granting of the loan and the issuing of the debenture was void. It is not correct to say that the defendants knew that what was being done was illegal. They knew simply that it was being done. [They referred to *Spink (Bournemouth), Ld.* v. *Spink* (1).] The plaintiff company cannot be heard to claim relief on the ground that it has committed a criminal offence as principal offender: *In re V. G. M. Holdings, Ld.* (2). The court will not grant relief if it is brought to its notice that the person seeking relief is involved in an illegal transaction, even if that transaction is ex facie perfectly innocent.

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(1) [1907] 1 Ch. 300, 306.

The company cannot come within the exception the statement of which was cited from the judgment of Parker J. in *Lodge* v. *National Union Investment Co.* (3), for it is not one of the class of persons for whose protection the illegality of the contract was created. Those persons are shareholders and secured creditors. [They referred to *Anderson, Ld.* v. *Daniel* (4) and *Holman* v. *Johnson* (5).]

Slade K.C. replied.

ROXBURGH J. The security, namely, the debenture, was issued by the plaintiff company " in connexion with a purchase " made by " a " person " (namely, Mr. Jaina) of " shares in " the company, and the greater part of the 10,000*l.* provided " by the defendant company was used to complete the " purchase of the shares." But, while the main purpose of the debenture was to facilitate that purchase, it was intended to be—and was—also security for money advanced to the plaintiff company for, and used by it for, some other purpose. I hold that the defendant company knew those facts, but it is neither pleaded nor proved that the defendants knew that the transaction, as carried out, contravened s. 45.

Mr. Slade, for the plaintiff company, contended that the law is that, if the debenture holder knows that the company, by the debenture, is giving even the least financial assistance to any person in connexion with the purchase of any of its shares, the debenture will be invalid, even though the amount involved in the purchase of the shares may be 50*l.* or less, and that secured by the debenture 100,000*l.* or more. He contended that applying well-settled principles of law to the interpretation of s. 45, I am driven to hold that, although in terms it imposes on the actual doer of the prohibited act a maximum penalty of 100*l.*, it may impose on a person whose offence is knowledge

(1) [1936] Ch. 544.
(2) [1942] Ch. 235.
(3) [1907] 1 Ch. 300, 306.
(4) [1924] 1 K. B. 138.
(5) (1775) 1 Cowp. 341.

of what the principal offender is doing what, in effect, is a penalty with no fixed upper limit. If those contentions are correct, the section may, indeed, prove a positive boon to the principal offender. In the present case the plaintiff company would obtain, at the expense of the defendant company and at none to itself, a sum much greater than any fine which could be imposed on it under the section. If that is the law, the defendant company has involuntarily made a present to Mr. Jaina of shares which cost it 9,000*l*. and a present of 1,000*l*. to the plaintiff company.

In my judgment, however, there are two answers to Mr. Slade's contention. The first is in the construction of s. 45. Section 45—in marked contrast to s. 79—does not indicate an intention to avoid the security to which it refers, or to punish the lender. Punishment of the lender, if intended, would have been expected to bear some relation to that of the principal offender, which is limited to 100*l*. If Mr. Slade's contentions for the plaintiff company are correct, what is, in effect, a penalty on the lender is unlimited. Moreover, rather special provisions of a consequential nature would have been expected if it was intended, by s. 45, to punish the lender by destroying his security, for questions of a cognate character have long since arisen in relation to ultra vires transactions by a company and are well known to have given rise to complicated situations. Section 45 is new in the Companies Act, 1929. Of the two cases which have been decided upon it, *Spink* (*Bournemouth*), *Ld.* v. *Spink* (1) does not on close analysis throw light on the point before me, but in construing the section I can, I think, have regard to *In re V. G. M. Holdings, Ld.* (2). In that case, Lord Greene M.R., said: " Those whose memories " enable them to recall what had been happening after the last " war for several years will remember that a very common form " of transaction in connexion with companies was one by which " persons—call them financiers, speculators, or what you will— " finding a company with a substantial cash balance or easily " realizable assets such as war loan, bought up the whole or the " greater part of the shares of the company for cash and so " arranged matters that the purchase money which they then " became bound to provide was advanced to them by the " company whose shares they were acquiring, either out of its " cash balance or by realization of its liquid investments.

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(1) [1936] Ch. 544.

(2) [1942] Ch. 235, 239.

"That type of transaction was a common one, and it gave rise "to great dissatisfaction and, in some cases, great scandals. "I think that it is not illegitimate to bear in mind that notorious "practice in considering the ambit of the section. I do not "mean by this that, if the language of the section is wide enough "to extend beyond transactions of that general character, "that would afford any ground for cutting the language down. "The only use which I think it is legitimate to make of it "is that the existence of this very questionable practice "affords a reason for the word 'purchase' in the section." The point in that case was the meaning of the word "purchase" in the section, which is not directly relevant in the case before me. I think, however, that I am entitled, and perhaps bound, to construe the section with those observations of Lord Greene M.R., in mind.

The section provides, not that it shall not be lawful for a company to provide a security in order to give financial assistance, but that it shall not be lawful for a company by means of the provision of security to give any financial assistance. In my judgment, "security" prima facie means "valid security," although I do not say that it must mean that. Moreover, the words of the section are not "purport to "give financial assistance" but "give financial assistance" and I cannot see how an invalid debenture could give any financial assistance. If, then, the section is, as I hold it is, referring to the provision of valid security and is treating the security as valid at the moment of the commission of the offence by the borrower, what is there to invalidate it subsequently? The section punishes the borrowing company on the footing that the security provided was and remains valid. Therefore, those principles of law to which Mr. Slade, on behalf of the plaintiff company, referred me, cannot be imported, and I cannot believe that the legislature intended them to be imported, as they appear to lead to the extravagant consequences which I have indicated.

The second answer to Mr. Slade's contentions for the plaintiff company is in the passage to which he referred me in Anson on Contracts, 19th ed., at pp. 238–239. For the purposes of that second answer it must be assumed, contrary to my holding above, that the debenture is properly to be described as an illegal contract. The passage in Anson is: "It remains "to consider whether a party to an illegal contract can under "any circumstances make it a cause of action. The rule is

" clear that a party to such a contract cannot come into a court " of law and ask to have his illegal object carried out; nor can " he set up a case in which he must necessarily disclose an " illegal transaction as the groundwork of his claim; and this " rule holds good although neither party had any intention of " breaking the law. The rule is expressed in the maxim, " 'in pari delicto potior est conditio defendentis.' But there " are exceptional cases in which a man may be relieved of an " illegal contract into which he has entered; cases to which " the maxim just quoted does not apply. They fall into four " classes: (I.) the contract may be of a kind made illegal by " statute in the interests of a particular class of persons of " whom the plaintiff is one . . . ."

Mr. Slade for the plaintiff company, contends that the plaintiff company is one of that class of persons and therefore comes within that exception. In *Lodge* v. *National Union Investment Co., Ld.* (1), Parker J., said: " The usual rule is that in the case of a transaction " void for illegality neither party can take any proceedings " against the other party for the restoration of any property " or for the repayment of any money which has " been transferred or paid in the course of the illegal transaction. To this rule, however, there are exceptions, one of " them being in favour of the persons for whose protection the " illegality of the contract has been created . . . ."

It is to be noted that it is not made quite clear whether that means that the illegality was created solely or primarily to protect a particular class. That is why I wished to read a statement of the exception from so authoritative a source. Had I thought that, in this case, the illegality was created primarily in favour of the class of persons of which the plaintiff company is one, I should have wished to hear much further argument on the precise content of that exception.

Mr. Slade contended—as he was entitled to contend—that, notwithstanding that in s. 45 the only persons singled out by name for punishment are the company and its officers the primary class of persons for whose protection the illegality of the contract was created—assuming it to be illegal—is companies. To investigate the purposes underlying particular provisions in a statute so complex as the Companies Act, 1929, is not easy, and, in the present case, the investigation did not

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(1) [1907] 1 Ch. 300, 306

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proceed very far. Viewing the position, however, with the guidance of the observations of Lord Greene M.R., in his judgment in *In re V. G. M. Holdings, Ld.* (1), I cannot hold that the plaintiff company has been shown to come within the exception. Accordingly, it is put out of court by the application of the general principle—which Mr. Slade did not dispute—and the action is dismissed with costs.

Solicitors: *Canter, Hellyar & Co.; Mawby, Barrie & Letts.*

(1) [1942] Ch. 235, 239.

K. R. A. H.

Applied. *Re* STERN [1950] 2 All E.R. 160.

Considered. In re STERN [1950] Ch. 250

VAISEY J.

1946

Mar. 15.

In re QUESKEY

AND

In re GUARDIANSHIP OF INFANTS ACT, 1925.

Infant — Marriage — Refusal of parents' consent — Application to justices for consent—Dismissal—Appeal to High Court—Marriage Act, 1823 (4 *Geo.* 4, *c.* 76)—*Guardianship of Infants Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *ss.* 7 (3.), 9.

The right of appeal to the High Court from an order of justices under the Guardianship of Infants Act, 1925, is only from orders made on applications, relating to custody and guardianship of infants, under the Guardianship of Infants Acts, 1886 and 1925. In the case of applications under s. 9 of the Act of 1925 to obtain the consent of the court to the marriage of an infant, whose parents have refused to consent, the decision of the justices is final, and there is no right of appeal. Section 9 of the Act of 1925 is not an amendment of the Act of 1886.

APPEAL from justices in petty sessions.

The applicant Norma Queskey, a girl, eighteen years of age, applied to the superintendent registrar to be married to Marcus Bishop, a man twenty-two years of age, but her parents refused their consent. She then applied to the justices of Kingston-upon-Hull sitting in petty sessions, under s. 9 (1.) of

VAISEY J.

1946

QUESKEY, *In re.*

the Guardianship of Infants Act, 1925 (1), for their consent, but on January 17 after hearing evidence for the applicant, and of the parents who were made respondents to the application, they refused to give such consent on various grounds. The applicant gave notice to the respondents of her appeal to the High Court, but a preliminary objection was taken that no appeal lay.

A. W. Stevenson for the appellant.

M. O'C. Stranders for the respondents in support of the preliminary objection. There is no right of appeal unless it is given by statute: *National Telephone Co., Ld.* v. *Postmaster-General* (2), per Kennedy L.J. The only right of appeal under the Guardianship of Infants Acts is that given by s. 7, sub-s. 3, of the Act of 1925, which only lies where an application has been made to the court of summary jurisdiction under the Guardianship of Infants Act, 1886, as amended by the Act of 1925, and the court has made or refused to make an order. Unless s. 9 giving the court jurisdiction to consent to marriage is an

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(1) By the Guardianship of Infants Act, 1925, s. 7, sub-s. 3: Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, 1886, as amended by this Act, the court makes or refuses to make an order, an appeal shall, in accordance with rules of court, lie to the High Court.

Section 9, sub-s. 1: The consent required to the marriage of an infant, in the case of a marriage intended to be solemnized or contracted on the issue of any certificate by a superintendent registrar, whether by licence or without licence, shall be that of the person or persons mentioned in the schedule to this Act. Provided that . . . . (*b*) if any person whose consent is required refuses his consent, the court may, on application being made, consent to the marriage and the consent of the court so given shall have the same effect as if it had been given by the person whose consent is so refused. Sub-section 4: For the purposes of this section "the court" has the same meaning as in the Guardianship of Infants Act, 1886, as amended by this Act. . . .

Section 11, sub-s. 2: This Act shall (except so far as it amends the law relating to the marriage of infants) be construed as one with the Guardianship of Infants Act, 1886, and that Act and this Act may be cited together as the Guardianship of Infants Acts, 1886 and 1925.

Schedule.

Consents required to the marriage of an infant.

I. Where the infant is legitimate.

Circumstances.	Persons whose consent is required.
(1.) Where both parents are living.	
(*a*) if parents living together;	Both parents.

(2) [1913] 2 K. B. 614, 621

amendment of the Act of 1886, no appeal will lie. That section is not an amendment of the Act of 1886, but a re-enactment with modifications of ss. 16 and 17 of the Marriage Act, 1823. This is confirmed by the terms of s. 11, sub-s. 2, which expressly states that the Act in relation to the marriage of infants is not to be read as one with the Act of 1886. Further, the expression " the court " is re-defined in s. 9, sub-s. 4, in such a way as to make it impossible to say that s. 9 is an amendment of the Act of 1886. If it were such an amendment, s. 9, sub-s. 4 would be unnecessary.

Stevenson in reply on the objection. There is a general right of appeal from any order of justices under the Act of 1925 under s. 7, sub-s. 3. But if not, there is an implied right of appeal. See Annual Practice, 1945, Note to Order 58, r. 1, at p. 1283. " But where by statute matters are referred to a " court of record with no further provision, a right of appeal is " implied " per Lord Parker in *National Telephone Co., Ld.* v. *Postmaster-General* (1).

[*Stranders.* The statement attributed to Lord Parker by the Annual Practice is entirely erroneous. He did not say that there was an implied right of appeal. What he said was " the " necessary implication is that the court will determine the " matters as a court. Its jurisdiction is enlarged but all the " incidents of such jurisdiction, including the right of appeal " from its decision, remain the same."]

VAISEY J. This case comes before me on an appeal from an order of the magistrates of Kingston-upon-Hull, who, on January 17 refused their consent to the marriage of the appellant, a young lady of some eighteen years of age. I am asked to reverse this decision on a variety of grounds, but the application is resisted on the preliminary ground that no appeal lies.

The matter arises in this way. The Guardianship of Infants Act, 1925, is entitled " An Act to amend the law with respect " to the Guardianship, Custody and Marriage of Infants." In respect of two of these matters—guardianship and custody—it operates by way of amendment of the Guardianship of Infants Act, 1886. But that Act—the Act of 1886—did not in any way deal with the marriage of infants, a matter in respect of which provisions were contained in the Marriage Act, 1823, and in respect of that matter the Act of 1925 operates by way of

(1) [1913] A. C. 546, 562.

amendment of the Act of 1823 and not by way of amendment of the Act of 1886 at all. Section 9 of the Act of 1925 refers to a schedule containing a list of the persons whose consent to the marriage is required, and it empowers " the court " to give its consent to a marriage in cases where such persons have withheld it. Sub-section 4 of s. 9, defines " the court " as having the same meaning as in the Act of 1886, that is to say, either the High Court, or a county court, or a court of summary jurisdiction.

In the present case the application was made to the justices owing to the refusal of consent by the appellant's parents. Now the only provision in the Act of 1925 which deals with appeals is s. 7, sub-s. 3, which provides, so far as material, that where on an application to a court of summary jurisdiction under the Act of 1886, as amended by the Act of 1925, the court makes or refuses to make an order an appeal shall lie to the High Court. The difficulty in the appellant's way is that that from which she seeks to appeal is the making or refusal of an order not on an application under the Act of 1886 as amended by the Act of 1925, but on an application under the Act of 1925 only.

It seems to me plain that s. 7, sub-s. 3, relates solely to those matters of guardianship and custody to which both the Acts extend. This conclusion is confirmed by s. 11, sub-s. 2, of the Act of 1925, which says " This Act shall (except so far as it " amends the law relating to the marriage of infants) be " construed as one with the Guardianship of Infants Act, 1886." It does not appear that there has ever been any attempt to appeal from justices in such a case as the present one. I am satisfied that I have no jurisdiction to entertain this appeal, and I dismiss it with costs.

Solicitors : *Richard Witty & Co., Hull ; Miller Clayton & Co., for Pearlman & Rosen, Hull.*

H. L. L.

C. A.

1946

May 1, 2.

Lord Greene M.R., Morton and Somervell L.JJ.

In re HORN. WESTMINSTER BANK, LIMITED *v.* HORN.

Will—Construction—Loan by testator during his life to a son—Direction in will that loan to be taken in satisfaction of his share of residue and to be brought into hotchpot and accounted for accordingly—Hotchpot clause—No residuary estate—Effect of direction.

After giving a number of legacies including certain large settled legacies, a testator bequeathed his residuary estate to his four children, if (as happened) they survived him, and he directed that two loans to a son should " be taken in or towards satisfaction " of the share of such child . . . . in my residuary estate and " shall be brought into hotchpot and accounted for accordingly." There was no residuary estate :—

Held (affirming Cohen J.) that the clause was a mere hotchpot clause and did not operate as a release or gift to the son of the loans to him.

Dicta of Lindley and Rigby L.JJ. in *In re Cosier* [1897] 1 Ch. 325, 331, 333, suggesting the contrary had been criticized adversely by Lord Macnaghten on the appeal from that decision (reported *sub nom. Wheeler* v. *Humphreys* [1898] A. C. 506, 510, 512) and ought not to be applied.

Decision of Astbury J. in *In re Trollope* [1915] 1 Ch. 853, disapproved.

Appeal from Cohen J.

By his will, dated October 26, 1942, the testator Henry John Horn, after appointing the Westminster Bank, Ld. and three other persons to be his executors and trustees, by cl. 3 (*b*) gave to each of his four children, the defendants Geoffrey Cecil Horn, Robert John Horn, Madeleine Edith MacKilligin and Audrey Violet Horn, the sum of 1,000*l.* and by cl. 4 bequeathed to his trustees free of duties arising on his death, (*a*) the sum of 5,000*l.* (therein called Madeleine's children's legacy) ; (*b*) the sum of 40,000*l.* (therein called Madeleine's settled legacy) ; (*c*) the sum of 25,000*l.* (therein called Audrey's settled legacy) ; (*d*) the sum of 45,000*l.* (therein called Geoffrey's settled legacy); and (*e*) the sum of 45,000*l.* (therein called Robert's settled legacy). By cl. 5 the testator provided that if his estate should not suffice to provide in full for all the above legacies the legacies bequeathed by cl. 3 and the first three of the settled legacies should all rank pari passu and in priority to Geoffrey's and Robert's settled legacies. In subsequent clauses the trusts of the settled legacies were set out and the trusts of Geoffrey's settled legacy were on trust for the son Geoffrey during his life and afterwards on trust for the benefit of his children and remoter issue, subject to the power to make an appointment for the benefit of any surviving wife for her life or for any less period. By cls. 12 and 13 the testator devised and bequeathed all his real and personal property to the trustees on trust for sale and conversion and out of the proceeds to pay his funeral and testamentary expenses and debts and to pay or provide for the legacies given by him and all death duties. Then by cl. 14 the trustees were to stand possessed of the residue of his estate in trust in equal shares for such of his four children as should survive him and upon trusts for all or any the issue of any child who died in his lifetime as therein mentioned. Clause 15 provided : " All money which I have lent or covenanted or " agreed to lend or which I may hereafter lend or covenant or " agree to lend to any child of mine on his or her marriage or " otherwise for his or her advancement or establishment in life " and the interest on all such money shall in default of any " direction to the contrary in writing under my hand be taken " in or towards satisfaction of the share of such child or his or " her issue taking by substitution as aforesaid in my residuary " estate and shall be brought into hotchpot and accounted for " accordingly." The testator died on February 16, 1944, and his children all survived him. The testator in his lifetime lent to the son Geoffrey the two sums of 11,200*l.* and 2,500*l.* (making together the sum of 13,700*l.*) on which interest was payable at the rate of five per cent. per annum. The testator's estate was not sufficient to answer all the settled legacies, it being anticipated that after providing for the legacies given by cl. 3 and the settled legacies given by sub-cls. (*a*), (*b*) and (*c*) of cl. 4 there would be only about 43,000*l.* left, so that even if the sum of 13,700*l.* lent to the son Geoffrey had to be brought into account there would be insufficient to answer Geoffrey's and Robert's settled legacies.

In these circumstances a summons was taken out by trustees asking (among other things) whether upon the true construction of the will and in the event which had happened of there being no residuary estate of the testator, the son Geoffrey was liable to pay to the estate the sum of 13,700*l.* owing by him to the testator at his death and any and what interest thereon.

Cohen J. held that cl. 15 of the will did not operate as a release of the debt of 13,700*l.* and that the son Geoffrey was liable to pay it to the testator's estate with interest at five per cent. per annum as from the date of the last payment of interest. The son Geoffrey appealed.

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HORN, *In re.* WESTMINSTER BANK, LD. *v.* HORN.

Gray K.C. and *Eardley-Wilmot* for the son Geoffrey. Clause 15 of the will is not a hotchpot clause and its effect is to convert the loans there referred to into gifts. The intention was that the loans should be set off against the son Geoffrey's share of residue, if there was any residue; but even though there is no residue the clause operated as a gift by the testator of the loans. The son is relieved from the burden of the loans in any event. If it had been intended that in default of residue the loans were to be taken into account against the son's share of the settled fund, it would have been an ordinary case of hotchpot and the ordinary hotchpot clause would have been used to represent the testator's wishes. The direction that the loans were to " be taken in or towards satisfaction " shows that there is a gift independently of the existence of residue: *In re Cosier* (1) on appeal in the House of Lords under the name of *Wheeler* v. *Humphreys* (2): see also *Limpus* v. *Arnold* (3) where, however, the estate sufficed to cover the debt, and *In re Akerman* (4). In this connexion regard should be had to the ordinary form of hotchpot clause: see Davidson's Precedents, 3rd ed., vol. 4, p. 158. The clause here not only directs that the debt is to be brought into account against the share of residue but goes further and gives a full release of the debt. The words " shall be brought into account " are used as part of the common form: see 2 Key and Elphinstone's Precedents (14th ed.), p. 899. It is a fair reading of cl. 15 that, although the debt is intended to be brought into account against the share of residue, it is in any case released. If this were not so, the clause would operate if there was only 5*l.* of residue but not if there was none. " Taken in satisfaction," are words of gift. This clause may be contrasted with the ordinary hotchpot clause: *In re Young* (5), *In re Barker* (6), *In re Warde* (7).

Andrew Clark K.C. and *Gwyn Rees* for the representative of the son Robert (who had died since the hearing before Cohen J.) and his infant son. This is purely a question of construction of the particular will. Clause 15 is only intended to take effect if there is residue on which it can operate. The whole will is intended to give the testator's sons equal rights. Thus, by cl. 5 where the testator's estate was insufficient to provide all the settled funds, the two brothers' funds are to

(1) [1897] 1 Ch. 325.
(2) [1898] A. C. 506, 510.
(3) (1884) 15 Q. B. D. 300.
(4) [1891] 3 Ch. 212, 219.
(5) [1914] 1 Ch. 581, 584.
(6) [1918] 1 Ch. 128.
(7) (1914) 111 L. T. 35.

abate equally. So too, the residue was given equally and the direction to take loans into account is intended to achieve equality. If cl. 15 were to operate as a gift of the loan in default of residue the whole object of the will would be defeated and there would be the grossest inequality. Clause 15 is a charging clause and there are no words of gift sufficient to release the debt. It is a mere hotchpot clause and has no effect, as there is no residue: *In re Schweder* (1). The other side have to rely on dicta in *In re Cosier* (2) which were disapproved in the House of Lords (3) by Lord Macnaghten: see also *In re Trollope* (4) and *Limpus* v. *Arnold* (5). The words "shall be brought into account and accounted for accordingly" are mere words of charging such as occur in a normal hotchpot clause. Lastly, cl. 15 applies only to advancements for setting up in life and there is no evidence that the debt here was of that character.

[They were stopped.]

J. V. Nesbitt for the trustees.

Eardley-Wilmot replied and referred to *In re Clark* (6).

LORD GREENE M.R. If it had not been for certain observations in previous cases, I myself should not have thought that the present question was really open to argument. [His Lordship stated the facts, and continued:] In these circumstances the son, Geoffrey, disputes his liability to discharge his debt to the estate and relies on cl. 15 of the will, which he says, on its true construction, operated as a discharge of the debt. The words on which he relies are the words which say that the money lent should be "taken in or towards satisfaction of the "share of such child or his or her issue taking by substitution ". . . . in my residuary estate." Those words, he says, on their true construction, are words which give the debt to the debtor and, therefore, operate as a release of the debt notwithstanding that there is no residue at all. I have said that apart from observations in previous cases, I should have thought the answer to this question was clear. Of course, there is no set formula required for the release or forgiveness of a debt in a will; all that is required is that the testator shall have made his intention clear. But one thing that is certain in this case, is that the testator has not in terms forgiven or released a debt.

(1) [1893] W. N. 12; 37 Sol. J. 249.
(2) [1897] 1 Ch 325.
(3) [1898] A. C. 510.
(4) [1915] 1 Ch. 853.
(5) (1885) 15 Q. B. D. 300.
(6) [1924] W. N. 75.

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Lord Greene M.R.

The release must be spelt in some way out of the direction in cl. 15, that the money lent is to be taken in or towards satisfaction of the share in the residue. It is, in my opinion—and I am speaking now without reference to the authorities—reasonably clear that you cannot concentrate on the word "taken" and say that that is a word of gift: you must read it in its context and it is untrue to say that the testator has said that his son shall "take" anything at all simpliciter. He has said "taken in or towards satisfaction of the share in "the residue." That is not a direction for absolute taking, but a direction for taking in certain conditions and for certain purposes and for no other purposes.

In the present case there is no share of residue, and it is argued by the respondents that there is no room for the operation of this clause, because it is only to come into operation on the occasion and for the purpose stated, namely, the occasion when residue is being distributed and for the purpose of equalizing the distribution. That, in my opinion, is the correct view, but the matter must, I think, also be looked at from a rather broader angle and in relation to what has been said to be the meaning of the words "be taken in or towards "satisfaction." Therefore, I do not rest my judgment entirely on the view that this clause cannot operate unless there is a residue. If there was even a small residue, that argument would, or might, fail to have effect and it appears to me that even if that argument be disregarded or be thought to be wrong, cl. 15 by itself does not extinguish the debt in any circumstances save where there is sufficient residue to enable the directions to be carried out, namely, that the amount of the money owing is to be taken "in or towards satisfaction" of the share. In other words, this must not be construed as forgiveness either in whole or in part of the loan. Clause 15, as it appears to me—again, without reference to authority—is nothing more nor less than an ordinary hotchpot clause. It is a hotchpot clause which has been adapted to meet the case not of gifts for advancement, but of outstanding loans. It was suggested that to construe this as a mere hotchpot clause in the case of a loan, would be really to give it no operative effect, because, in the case of a loan, the debtor would be bound in any event to bring into account, before he could take any share, the amount outstanding of his debt. As was pointed out by my brother Morton in the course of the argument, that cannot possibly be right in the case of the substitutional gift to issue because, apart from some such clause as this, the outstanding debt owed by a father who had predeceased the testator could not be brought into account as against the share given to his issue by substitution and, therefore, it is manifest that cl. 15 on any view was a necessary clause.

The argument of Mr. Gray involved giving two totally different meanings to the two limbs of the clause, namely, (*a*) the limb which says that the money owing is to "be taken "in or towards satisfaction," and (*b*) the limb which says it "shall be brought into hotchpot and accounted for "accordingly." He agrees that the latter is, what I may call an ordinary hotchpot clause, but he says that the former limb is something more and is a gift or release. In my opinion, this is merely a verbose way of expressing the ordinary hotchpot provisions and both limbs mean really the same thing. That is confirmed by the use of the word "accordingly." The testator is really putting it in two forms of language, the one the popular language understandable by the layman, "taken in or towards satisfaction of the share," and the other, the technical language understandable by a lawyer, "shall "be brought into hotchpot"; and really the two expressions mean the same thing. The words "shall be taken in or towards "satisfaction" are not, in my view, words of discharge. To use the language of Sargant J., as he then was, they are words of charge. They are not saying "the debt "is extinguished," but they are saying how the debt is to be dealt with in the distribution of the estate. It seems to me that to read out of the word "taken" a gift or release or forgiveness of a debt would be to interpret in a forced and unusual sense words inserted alio intuitu. One cannot shut one's eyes to the fact that the courts are sometimes disposed, very naturally disposed, to view favourably a rather strained interpretation, if that is considered necessary to achieve the overriding purpose of the will or to avoid some blatant inequality or unfairness; but it is to be observed that to construe those words in the way suggested in the present case, so far from avoiding unfairness or inequality, would in fact create it, because the result would be that the son Geoffrey would obtain a far higher benefit from his father than his brother: he and his family would have a settled legacy equal to that taken by his brother and his family and, in addition to that, he would be discharged from his existing liability. That seems to me to be contrary to the general scope and intention of this will and I am certainly not prepared to put what I consider would be a forced construction on the words relied upon in cl. 15 when it would produce such a result.

Having approached the matter entirely without reference to previous cases, I must now say a word about the cases on which reliance is particularly placed. The son Geoffrey's sheet anchor is the case of *In re Cosier* (1) in this court. In that case there was a clause which, save in one respect, was practically identical with cl. 15 in the present case. There was the same provision about a sum being taken in or towards satisfaction of a child's share and the direction that it should be brought into hotchpot and accounted for accordingly. As a matter of fact, that is a common form which appears frequently and the difference between that form and that in the present case consists entirely of the fact that instead of the sum dealt with being a sum which had been given or covenanted to be given to the child, as in *In re Cosier* (1), there were here sums which were lent to the child ; so that what has happened is that that particular form has been taken and used with the substitution of a reference to loan for the reference to an advancement. It was a curious case. The question related to a sum of 10,000*l.* in which, in the events which had happened, the father had a reversionary interest. He had covenanted on the marriage of his son to settle that sum and he retained a reversionary interest in it. The question was whether that sum was to be treated as part of his estate and therefore be divisible equally between the son and the daughter under the will or whether the son was to take it as part of his share, as against a similar sum given to the daughter out of the general estate. The latter result would have produced equality between the two children ; the former result would have benefited the daughter at the expense of the son. Chitty J. had held that the 10,000*l.* was divisible equally between the son and the daughter. The matter came before this court and Chitty J.'s decision was reversed and it was held that the 10,000*l.* went to the son, and the daughter, of course, got the corresponding 10,000*l.* out of the estate. The grounds on which this court appears to have based their judgment were first that the hotchpot clause covered the whole of the 10,000*l.*, notwithstanding the fact that the son has only received a life interest in it; and, secondly, that on the true construction of the hotchpot clause, the word "taken" amounted to a word of gift. There is no question, of course, in that case of release, because the matter was one not of a debt but of an asset of the testator, and the court construed the word "taken" as being a word of gift. There are certain dicta which have a bearing on our present question. Lindley L.J. said (1): "It was contended that this is to "render a hotchpot clause operative as a gift, which is not its "function. But that is only a half truth, and is very misleading. "A hotchpot clause in a will has always to be construed together "with some other clause which is a clause of gift, and the "question always is, What is the true effect of the clause of "gift and of the hotchpot clause which has to be construed "with it? The combined effect of the two clauses is always, "so far as I know, to pass to the legatee of what is given, the "testator's interest, if any, in that which is to be brought into "hotchpot." There he is referring to the combined effect of the hotchpot clause and of the gift in the will under which the residue was given equally between the son and the daughter. Then he says this: "Take the very common case put by my "brother Rigby in the course of the argument. Suppose a "father lends his son 1,000*l.*, and then bequeaths to him a share "of his residuary estate, and directs that the 1,000*l.* shall "be brought into hotchpot. What is this but a gift to the "son of the 1,000*l.* as part of the share given to him?" One thing that is clear there, to my mind, is that Lindley L.J. is considering, and considering only, the possible case where there is sufficient residue to enable the estate to be divided without cancelling any part of the debt, because he says: "What is "this but a gift to the son of the 1,000*l.* as part of the share "given to him?" He treats, as I say, the combined effect of the gift and the hotchpot clause as a gift. I should have thought myself, with respect, that where a testator directs that a debtor's son shall take the debt as part of his share of residue, the release of the debt takes place not by virtue of the word "take" or of any particular word, but by virtue of the very nature of the transaction which takes place when the accounts of the residue are settled up. The debt obviously could not survive the final distribution of the estate on the basis indicated. Rigby L.J. carries the matter a little further. He says (2): "Suppose, however, that the testator has lent a child money, "say 10,000*l.*, instead of giving it, and has, to make the "transaction clear, taken from the child a bond for repayment. "Or, suppose again, that he has lent the money to a stranger on

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(1) [1897] 1 Ch. 325.

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(1) [1897] 1 Ch. 331.

(2) Ibid. 333.

"mortgage. If the testator says, 'I declare that the money "'spent by me on my son's education shall be taken in or "'towards satisfaction of his share,' it is plain that, as to that "particular subject-matter, there can be no gift. In each of "the other cases the 10,000*l.* is an existing asset of the testator, "available for the payment of creditors, but, subject to their "claims, entirely at the testator's disposal. If then he says, "'I declare that the 10,000*l.* owing to me on bond by my son, "'or the 10,000*l.* lent by me on mortgage to A., shall be taken "'in or towards satisfaction of my son's share under my will,' "it would, in my judgment, be repugnant to common sense to "say that the son was not released from the debt in the first "case, and made the owner of the mortgage debt in the second. "This, however, is the same thing as saying that the words "operate as words of gift." There, again, I should have thought myself that the release of the debt takes place by virtue not of the words but of the very nature of the transaction. It is said in argument that those observations of Rigby L.J. are intended to apply not merely to the case where the residue is ample but to the case where the suggested release of the debt will involve an additional benefit to the son. I very much doubt whether the lord justice was thinking of that case at all. It seems to me much more probable that he was merely elaborating the point that he had put in argument, as referred to by Lindley L.J. One thing, I think, is clear, that he was construing the language of the hotchpot clause as equivalent to language of gift.

Those observations, whatever their extent may be, are, of course, only dicta, and, with great respect, I am unable to follow the reasoning on which they are based, which would appear to give a forced construction to a word inserted alio intuitu for the purpose of avoiding what in that case would have been a gross inequality between two children. That was the only way which this court saw of escaping from that inequality. The case went to the House of Lords (1) and the House of Lords succeeded in escaping from the inequality by a totally different construction of the will. I need not go into the details of it, but the construction that they put on the will involved no reliance on any part of the words in the hotchpot clause as amounting to words of gift. Lord Macnaghten, who delivered the leading opinion, said that the hotchpot clause was in the common form ; it was a clause which is textually

(1) [1898] A. C. 506.

the same as this with the exception that one related to gifts and the other to loans. He treats it as an ordinary common form of hotchpot clause, but he says more than that. He refers to the judgment of this court and he says: "They "found a way of escape." Then he says (1): "By inverting "the hotchpot clause they arrive at a correct result. The "whole fund, they say, must be brought into hotchpot by "the son. It has therefore to be taken towards satisfaction "of his share; the direction that it is to be so taken implies "a gift, and therefore whatever interest the father retained "in the fund is given to the son by the hotchpot clause, as "Rigby L.J. thinks, or, as the other members of the court "held, by the conjoint operation of that clause, and the gift "in the earlier part of the will." That is his summary of the reasoning of this court and he then proceeds as follows: "Now I must say I cannot follow this reasoning. It seems to "me plain that the testator's reversionary interest in the fund "cannot come under the operation of the hotchpot clause. "Nothing was to be brought into hotchpot but what the "testator had covenanted or agreed to give. The hotchpot "clause is in the common form. The clause must have its "ordinary effect." Then he says (2): "I desire to rest my "judgment on the plain language of the will without putting "any strained construction on any words in the hotchpot "clause or giving it a peculiar or unusual effect." Now those words of criticism, it is said, must be taken as having been directed solely to that effect given by this court to the hotchpot clause when they construed it as covering the father's reversionary interest in the 10,000*l.* I do not agree that those criticisms are limited to that. I read them as extending to the whole of the reasoning of the Court of Appeal and it is to be observed that Lord Macnaghten set out the whole of the reasoning, including the interpretation this court had put on the word "take" or "taken," and says: "I cannot follow "this reasoning." That, I should have thought, meant the whole of the reasoning that he had summarized in his preceding paragraph. I am all the more disposed to think I am right in construing the observation of Lord Macnaghten in that way because it seems to me to be the result which one would have come to without any authority. As I have said, this appears to me to be an ordinary hotchpot clause of a rather verbose form and the words "taken in or towards satisfaction" were inserted as indicating the working and machinery of such a clause and not for the purpose of producing a result by way of gift or by way of forgiveness of an existing loan.

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(1) [1898] A.C. 510. (2) Ibid. 512.

As I have said, *In re Cosier* (1) is the sheet anchor and I do not think that I need refer at any length to any other cases except *In re Trollope* (2) before Astbury J., on which reliance was placed. That is a case in which it appeared very likely that the estate would be deficient and would not cover the whole indebtedness of a debtor son. The will was not precisely in this form, but it did contain a provision that the advances to the son should be taken in full or in part satisfaction of the benefits given to him under the will. That the learned judge construed as amounting to a release of the debt. I am bound to say, with the utmost respect, that I do not think that that case has any real bearing on the question we have to decide. The judge's reasoning does not induce me to think that the views that I have expressed on this subject are in any way wrong. He bases himself almost entirely on the observations of the Court of Appeal in *In re Cosier* (1) to which I have referred, and he treats the criticisms of those observations in the House of Lords as not really affecting the view of the Court of Appeal or their persuasiveness in the case he had to deal with. In my opinion, the learned judge misconstrued the effect of the criticisms of the House of Lords, which, as I read them, entirely take away from the observations in *In re Cosier* any persuasive effect which those dicta might otherwise have had. He also, I think, placed too much weight on the earlier case of *Limpus* v. *Arnold* (3) and he disregarded a decision in *In re Schweder* (4). He says of that case (5): "it certainly "does look as if Chitty J. formed a definite opinion that a "proviso that a debt owing by a legatee should be taken in "full or part satisfaction of his or her legacy did not amount to "a release of that debt if, and to the extent that, the debt "exceeded the amount of the benefit." He had that authority before him. True it is not a very full report, but that is his interpretation of it, and he declines in effect to be guided by it, because he thought that *In re Cosier* (1) was too strong. That case of Chitty J., as understood by Astbury J., was, in my view, decided correctly and Astbury J. ought not to have disregarded it. In so far as he is bound to take into account decisions on other wills, he should not have disregarded it on the ground that *In re Cosier* (1) lays down some other principle or method of construction.

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(1) [1897] 1 Ch. 325.
(2) [1915] 1 Ch. 853.
(3) 15 Q. B. D. 300.
(4) [1893] W. N. 12; 37 Sol. J. 249.
(5) [1915] 1 Ch. 862.

I do not think that I need refer to any of the other cases which have been cited to us. In my opinion, putting it quite shortly, this is an ordinary hotchpot clause and there cannot be extracted from it any words sufficient to release or forgive the debt and in the events which have happened the son Geoffrey is bound to make good to the estate the sum in question. What has happened, I think, must be what so frequently happens, that a rather unintelligent copying and adaptation of a common form has been made without really considering whether the words are suitable or convenient or not. If the testator desired to forgive a debt, he could quite easily have said so. It is not, in my opinion, legitimate to extract such an intention out of these words and particularly so where the result of so doing would be not to avoid but to create a gross inequality and injustice. The learned judge's judgment, which unfortunately we have not before us because no note was taken of it, was perfectly right in its conclusion and this appeal must be dismissed.

MORTON L.J. I entirely agree, both with the conclusion at which my Lord has arrived and with the reasons for it. I do not think I can usefully add anything.

SOMERVELL L.J. I agree.

Appeal dismissed.

Solicitors: *Marshall & Hicks Beach*; *Wrentmore & Son*; *Murray, Hutchins & Co.*

H. C. G.

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(1) [1897] 1 Ch. 325.

In re THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, AND *In re* CRIPPS.

C. A.
1946
Apr. 9, 10.
Scott, Morton and Tucker L.JJ.

Receiver — House — Letting by receiver without sanction of debtor or of court—Power of court to approve letting subsequently.

No lease can be granted by a receiver of the rents and profits of a house without the sanction of the court; but if a receiver let a

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The Liabilities (War-Time Adjustment) Act, 1941, *In re.*
Cripps, *In re.*

house without such sanction, the court can approve the letting, after the letting has, in fact, begun.

Stamford, Spalding & Boston Banking Co. v. *Keeble* [1913] 2 Ch. at p. 96 cited and quaere in the Court of Appeal (February 25, 1913, unreported) followed.

Appeal from the West London county court.

On August 10, 1942, a liabilities adjustment order was made for the adjustment or settlement of the affairs of the debtor, Mr. Alfred Redgrave Cripps. By that order, inter alia, the debtor was allowed to retain certain assets, subject to the appointment of a receiver in respect of a house of the debtor, 11, Ambrose Place, Worthing. The appointment was made by the same order "without prejudice to the rights of any "prior encumbrancers upon those premises who may think "proper to take possession of them or, if any "prior encumbrancer is in possession, then without "prejudice to such possession." The balance, if any, of the rents and profits after making certain payments in favour of the encumbrancers and others was to be paid to the debtor. In 1943, the debtor was anxious that the whole of the house should be let advantageously. By letter, dated March 25, 1944, Mr. C. E. Marr, the receiver wrote to the liabilities adjustment officer that he had been successful in finding tenants for the flats in the house: the upper maisonette at a rent of 75*l.* per annum inclusive for three years from March 25, 1944, to a Miss Tatham and the ground floor at 1*l.* per week inclusive. The receiver wrote that it had been suggested that it was necessary for him to apply to the court for leave to let for this period and he continued "I should be "glad if you would grant this leave so that the tenancies may "be completed." The liabilities adjustment officer was informed subsequently that the tenant of the ground floor flat had withdrawn her offer and as he thought, in error, that this tenant was Miss Tatham, there was no application to the court to sanction the letting of the upper maisonette to Miss Tatham.

The debtor, who now favoured a sale of the house, with possession, total or partial, applied to the county court for the following relief: (1.) "A declaration that the receiver appointed "by the court, C. E. Marr, had no right or authority without "the consent of the debtor or the order of the court to re-let "the upper part of the premises known as 11 Ambrose Place, "Worthing, in March, 1944, to Miss Tatham; (2.) For an "order that the debtor be at liberty to institute proceedings

" for the recovery of possession of the premises from Miss " Tatham." The county court judge dismissed the application and the debtor appealed.

The debtor appeared in person.

P. B. Morle for the receiver: In Seton on Judgments (7th edition, 1912), at p. 769 there is the following passage: " The power of a receiver to grant leases is limited to such parol " leases as are authorized by the Statute of Frauds (29 Car. II, " c. 2) s. 2: Kerr, 205, 206; but in an ordinary case a receiver " may, without applying for the sanction of the judge, let for " a year certain, or less, or for any term not exceeding three " years: *Shuff* v. *Holdaway*, M.R. (Lord Romilly) " in chambers, 27 March, 1863, Dan. 1443." The same statement is contained in Daniell's Chancery Practice (8th ed., 1914), at p. 1487, but a note is added: " apparently a lease so " granted would only bind the receiver personally and not " third parties." Mr. Tomlin arguendo in *Stamford, Spalding & Boston Banking Co.* v. *Keeble* (1), after citing this passage from Seton said: " That statement has not been accepted by the Court of Appeal, which has laid it down that no " lease can be granted by a receiver without the sanction of the " court; but the court can approve the granting of any lease " which it considers necessary for the protection of or making " fruitful the mortgaged property." Sargant J. made no reference to this issue in his judgment and Mr. Tomlin is not reported as naming the case in the Court of Appeal on which he relied. A note in the Annual Practice 1945, under R. S. C., Or. 55, r. 5A, at p. 1176, gives the authority in the Court of Appeal as *Stamford, Spalding & Boston Banking Co.* v. *Keeble* unreported, and the date of the decision as February 25, 1913, that is in the month before the hearing of the case before Sargant J.—presumably on some interlocutory appeal. See Kerr on Receivers (10th ed.), at pp. 237–8.

MORTON L.J., giving the first judgment, at the request of Scott L.J.—With regard to the second relief claimed by the debtor, i.e., for an order that he be at liberty to institute proceedings for the recovery of possession of these premises from Miss Tatham, I know of no statute or rule which prevents him from instituting such proceedings, but his success in such an application would depend largely, if not wholly, on the result of the application for relief first claimed by him, i.e., a declaration that the receiver appointed by the court, C. E. Marr, had no right or authority without the consent of the debtor or the order of the court to re-let the upper part of the premises in March, 1944 to Miss Tatham.

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(1) [1913] 2 Ch. 97.

In *Stamford, Spalding & Boston Banking Co.* v. *Keeble* (1) Mr. Tomlin is reported as saying in argument (2): "The court "has a general jurisdiction as to allowing leases of mortgaged "property. In Seton on Judgments, 7th ed., p. 679, there is the "following passage": (His Lordship cited the passage). Mr. Tomlin then said: "That statement has not been accepted "by the Court of Appeal which has laid it down that no lease "can be granted by a receiver without the sanction of the court; "but the court can approve the granting of any lease which it "considers necessary for the protection of or making fruitful "the mortgaged property." No reference is made in the judgment of Sargant J. to this part of Mr. Tomlin's argument; but it appears to be correct that the Court of Appeal laid it down that no lease can be granted by a receiver without the sanction of the court and that is, in my view, the position to-day. It follows that in this case the receiver originally was exceeding his authority, if and in so far as he granted a tenancy of the upper maisonette to Miss Tatham; but in my view, it would not be right for this court, in the absence of Miss Tatham, to express any view as to the present legal position as between Miss Tatham and the receiver.

Mr. Morle has contended that by two paragraphs of his judgment the county court judge granted his sanction ex post facto to the letting of the maisonette to Miss Tatham, but if that were his intention it certainly was not clearly expressed. There was no separate application for such approval, but in the course of his argument, the solicitor for the receiver asked the judge to "ratify the tenancy." I cannot at the moment see any reason why the county court judge should not have power to give his sanction to a letting by a receiver on a date after that letting in fact had begun; but I do not think that the judge has used words which amount to an exercise of that power.

In these circumstances I think the case should be remitted to the county court judge with an intimation from the court that the receiver was not entitled in March, 1944, to grant a tenancy to Miss Tatham without either the concurrence of the debtor or the sanction of the court. The county court judge should be invited to consider whether, in the light of all the circumstances, he should give his consent ex post facto to the letting. It will be necessary for him to find out what exactly is the letting to which he is being asked to give his consent. Is it a letting for three years from March 25, 1944, or is it some other kind of letting? He should also take into account the present situation as regards the other floors of the house and consider whether it is desirable, in the interests of the estate, to grant sanction now to a letting which, unless and until such sanction is given, is invalid as between the debtor and Miss Tatham whatever its effect may be as between the receiver and Miss Tatham. I can see no reason why there should be an order that the debtor be at liberty to institute proceedings in regard to the part of the premises occupied by Miss Tatham, because as far as I can see the debtor does not need any such leave and no authority has been cited which indicates that he does require such leave.

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(1) [1913] 2 Ch. 96.

(2) Ibid. 97.

SCOTT L.J. I agree entirely with the judgment that has been delivered.

TUCKER L.J. I agree.

Judgment accordingly. Case remitted.

Solicitors for respondents: *Wilde, Sapte & Co.*

C. G. M.

In re GREYCAINE, LIMITED.

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1946
Apr. 15, 16.
Morton, Bucknill and Cohen L.JJ.

Company—Debentures—Receiver for debenture holders—Agreed remuneration—Compulsory winding-up—Liquidator's application to court to fix remuneration of receiver—Extent of jurisdiction—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 309.

By s. 309 of the Companies Act, 1929: "The court may, on an "application made to the court by the liquidator of a company, "by order fix the amount to be paid by way of remuneration to any "person who, under the powers contained in any instrument, "has been appointed as receiver or manager of the property of the "company . . . ."

Under a debenture trust deed, dated July 8, 1929, the trustee for debenture holders of a company was given power at any time

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after the security became enforceable, to appoint a receiver of the mortgaged property at a rate of remuneration not exceeding that provided by the Law of Property Act, 1925, s. 109, with a right to payment of costs and expenses. By an instrument, dated November 20, 1936, the trustee appointed two receivers and authorized them to retain out of the mortgaged premises or the moneys received by them thereunder (*a*) for remuneration a commission at the rate of five per cent. per annum, and (*b*) all "costs " . . . . and expenses " properly incurred. On March 8, 1908, an order was made for the compulsory winding-up of the company. The remuneration of the receivers had proved to be very large and on May 29, 1945, the liquidator applied to the court under s. 309 of the Companies Act to have the receivers' remuneration fixed. The registrar fixed a much lower amount intending that to cover the remuneration as from the date of the receiver's appointment. Lord Uthwatt (ante p. 162) set aside the registrar's order and decided that the court had power to reopen the question of the receiver's remuneration as from the date of the liquidator's application, although the remuneration had been agreed. On appeal:—

Held by the Court of Appeal (1.) that although s. 109 of the Law of Property Act, 1925, gave a receiver power only to retain for his remuneration and in satisfaction of all costs, charges and expenses a commission at a rate not exceeding five per cent. per annum, the remuneration was validly fixed by the trust deed and instrument of appointment; (2.) That, on the assumption (as held by Lord Uthwatt) that the court had power to reopen the matter, although the receivers' remuneration had been agreed, the court could only do so as from the date of the order and not (as Lord Uthwatt held) as from the date of the liquidator's application.

Order discharged and matter remitted to the registrar with a direction that any order made by him was not to disturb or relate to any remuneration to which the receivers became entitled pursuant to the terms of the trust deed and the instrument appointing them receivers out of gross moneys received by them up to the date of his order.

APPEAL from Lord Uthwatt (1) (during the argument Uthwatt J.).

A company was incorporated on October 25, 1912, under the name of F. Gruneisen & Co., Ld., with a nominal capital of 25,000*l.*, later increased to 75,000*l.* divided into 35,000 ordinary shares of 1*l.* each and 40,000 preference shares of 1*l.* each, to take over and carry on a business of bookbinders, stationers and publishers. In July, 1929, the company made an issue of 1,000 First Mortgage Debentures of 10*l.* each carrying interest at 6½ per cent. per annum and a bonus of two per cent., which

(1) *Ante* p. 162.

were subscribed, and at all material times held, partly by the Century Insurance Co., Ld. (hereinafter called the Century Company) and partly by the Friends Provident and Century Life Office (hereinafter called the Friends Company), which was a subsidiary of the Century Company. These debentures were secured by a trust deed, dated July 8, 1929, and made between the company (under the name of the Greycaine Book Manufacturing Co., Ld.) and the Century Company as trustee for the debenture holders under which the company mortgaged specific properties and charged all its undertaking, other property and assets with the payment of the principal money and interest. By cl. 10, the principal money became payable and the security enforceable if default was made in paying the interest for thirty days or in paying the principal moneys when they became due. Clause 11 gave any receiver appointed by the trustee under cl. 17 power in certain circumstances to realize the mortgaged property and cl. 12 power to carry on the business. Clause 17 provided: " The trustee at any time after this security becomes " enforceable may by writing appoint a receiver of the " mortgaged premises or any part thereof . . . . " (5.) The remuneration of such receiver shall be payable out " of the mortgaged premises and shall be at such rate not, " exceeding that provided in the Law of Property Act, 1925. " s. 109, as the trustee may from time to time determine . . . " (7.) The receiver shall out of the moneys received by him " pay all costs and expenses incurred by him in carrying on the " business of the company or otherwise in exercise of his powers " and his remuneration and shall pay over the balance to the " trustee to be applied by it as hereinbefore provided."

In November, 1934, the company made an issue of fifty second debentures of 1,000*l.* each carrying interest at 6½ per cent. and a bonus of two per cent. which were subscribed and at all material times held by the same two companies. These second debentures were secured by a trust deed, dated November 16, 1934, under which the Century Company was trustee for the debenture holders and all the covenants and provisions of the trust deed of July 8, 1929, were made applicable. By an instrument dated November 20, 1936, the Century Company pursuant to the powers conferred by the trust deeds appointed Bernard H. Brigham (one of the respondents) to be receiver of the mortgaged premises and by cl. 6 (2.) the receiver was authorized to retain out of the mortgaged premises or the money to be received by him thereunder, (*a*) for his remuneration a commission at the rate of five per cent. per annum on the gross amount of all money received by him, and (*b*) all costs, charges and expenses reasonably and properly incurred by him in the exercise of his powers as receiver. On April 8, 1937, Frederick Wilcock was appointed to be a receiver jointly with B. H. Brigham, the remuneration already provided to be divided between them in such proportions as they should agree. On March 8, 1938, the court made an order for the compulsory winding-up of the company and appointed joint liquidators, one of whom died on July 29, 1944, when the surviving liquidator was made sole liquidator.

The receivers had carried on the business of the company until September 27, 1940, when the company's works at Watford were destroyed by enemy action and heavy claims accrued to the company in respect of war damage. The liquidators obtained from the receivers a statement of receipts and payments up to November 20, 1943, which showed the receipts as 977,036*l.* of which the estimated trading receipts were 737,092*l.* The receivers had discharged the principal sum due on the second debentures and all but 27,000*l.* of the principal sum due on the first debentures, but there was 22,000*l.* due for gross interest on the two of them. They had also retained 22,100*l.* for their remuneration up to December 30, 1942, and paid sums for expenses and legal and professional charges. One of the receivers, Frederick Wilcock, died on October 20, 1944.

The surviving receiver and the personal representatives of the deceased receiver having made it clear that they claimed five per cent. on all the receipts making nearly 50,000*l*, the liquidator took out a summons dated May 29, 1945, under s. 309 of the Companies Act, 1929, asking for an order directing what amount of remuneration by way of commission should be paid to the joint receivers and to the surviving receiver and in what proportions such remuneration should be distributed between them; and for the proper accounts and inquiries. The registrar made an order that the remuneration should be allowed at 15,000*l.* On motions to have this order set aside, which admittedly was intended to fix the total remuneration of the receivers as from the commencement of the receivership, Lord Uthwatt said that the registrar's order was obviously unsatisfactory and indeed that the registrar had informed the court that he had made a slip in working out the scale of remuneration. The normal course would be to discharge the order and remit the matter to the registrar but the parties sought to obtain the court's decision on two points: (1.) whether the court had any jurisdiction when a receiver had been appointed at an agreed remuneration; and (2.) whether any order made could cover the past or only the future. As to the first question, s. 309 applied only when a receiver had been appointed and normally his remuneration would have been expressly fixed. But the section gives the court power to "fix" the remuneration and it meant "fix" whether there was or was not an operative agreement. As to the second question, the jurisdiction could be exercised only as to the future. The court is to "fix" the amount not "payable" but "to be paid." The section was directed to enabling the court, on a liquidator's application, to regulate the course of business with regard to a receiver's remuneration when once a winding-up has begun; not to enabling the court to reopen what had been carried out before an application under the section was made. The matter would be remitted to the registrar with a direction that any order made by him was not to relate to remuneration which had accrued payable to the receivers before the date of the liquidator's application. He gave leave to the liquidator to appeal. The liquidator appealed.

During the argument any claim by the receivers to payment of their staff was given up and counsel for the liquidator then abandoned the contention that because in the documents appointing the receivers provision was made for payment to them of "charges," the remuneration had not been fixed in accordance with the trust deeds.

Andrew Clark K.C. and *Aronson* for the liquidator. Three questions arise: (1.) Whether the receivers' remuneration was ever validly fixed; (2.) if so, whether the court has power to reopen the matter and fix remuneration under s. 309 of the Companies Act, 1929; and (3.) assuming that the court can do so, from what date can the company reopen it. To deal with the first question, cl. 17 of the trust deed gives power to appoint a receiver at remuneration at such rate not exceeding that allowable under s. 109 of the Law of Property Act, 1925, as the trustee may determine. The power under s. 109, sub-ss. 3 and 6 is clearly limited to remuneration out of income and Lord Uthwatt pointed out the inconvenience of applying that to property consisting both of capital and income. Further, s. 109, sub-s. 6, provides that the remuneration of five per cent. is to include costs, charges and expenses. The purported authority to the receivers to retain five per cent. of all the money received by them and costs and expenses (to ignore the inclusion of charges also) offended against the Act in two ways: (1.) it extends to capital as well as income, and (2.) it gives costs and expenses in addition. It all turns on the meaning of " rate " in cl. 17 of the trust deed and it is contended that the clause does not merely fix the maximum rate of remuneration by reference to s. 109. It remains to consider what is the power given to the court by s. 309 of the Act of 1929. Admittedly the registrar's order will have to be discharged as a mistake was made in working out the scale of remuneration. The question really is what direction should be given to him in remitting the matter to him. There are four possible dates from which the court can reopen the receivers' remuneration, (1.) as from the date of the appointment as the liquidator contends and as has been the regular practice of the registrar, (2.) as from the commencement of the winding-up, as the liquidator contends in the alternative, (3.) as from the date of the application in the winding-up as Lord Uthwatt found, and (4.) as from the date of the order. The first of these dates ought to be adopted but if the second were adopted, it should be with a direction that as from the date of their appointment the receivers were only entitled to remuneration at the rate fixed by s. 109 of the Law of Property Act, 1925.

In construing s. 309 of the Act of 1929 it is material to consider, (1.) what was the law before the Act, (2.) what was the mischief for which the law had provided, and (3.) what remedy did Parliament provide. As to (1.), the court had no power to review a receiver's remuneration, save under s. 109, of the Law of Property Act, 1925. As to (2.) the mischief as between the parties, was not great: they alone would suffer in ordinary mortgage bargains. So too in the case of a company as long as it remains a going concern, the creditors are not concerned: but the moment the company goes into liquidation, unsecured creditors may find themselves bound by an improvident bargain entered into by the directors and see the assets frittered away on the agent of the secured creditors.

As to (3.) the remedy provided is a right in the liquidator, not to repudiate the bargain, but to go to the court and ask it to fix a fair remuneration. There is nothing unusual in giving the liquidator greater power than could have been exercised by the company.

The words " to be paid " in s. 309 of the Companies Act, 1929, must mean " payable." They are in a sense future, but future from when? Not from the date when the matter comes before the court, but from the date of appointment of the receiver. There are two defects in the section. First, if " to be paid " speaks from any date other than the appointment of the receiver, there is nothing to indicate from what date it speaks. Secondly, if it speaks from any date other than the appointment of the receiver it should have drawn the distinction between remuneration earned and remuneration paid. If Lord Uthwatt be right, every liquidator will be obliged to safeguard himself by applying under s. 309 immediately on appointment, while such a construction may lead to an unseemly scramble on the part of receivers to realize assets. But if the court fixes any date other than the appointment of the receiver, it can still deal with any remuneration not actually already paid. [They also referred to s. 311 of the Companies Act, 1929.]

Upjohn K.C. and *Cecil Turner* for the personal representatives of the deceased receiver. There had been in existence for a number of years before the winding-up order was made and the liquidator appointed, a bargain by which the receivers were appointed and their remuneration fixed. Under the bargain the receivers and the surviving receiver had properly retained money due. The power given to the court by s. 309 of the Companies Act, 1929, is to " fix the amount to be paid " by way of remuneration " to a receiver. If that were construed as referring to past payments, it would involve unfixing and reviewing past remuneration. The words of the section are inappropriate for this. The words " to be paid " show that it is what is to be paid in the future that has to be fixed. Further it cannot be the test whether the receiver has actually paid himself out of what has been earned. He must be treated as paying himself when he receives the money and therefore it is the date of its receipt into his account that is material, and it is only as to money not received at the critical date that the order obtained by the liquidator can apply.

[MORTON L.J. I should have thought that the fixing of the receiver's pay on the application of the liquidator would be only from the date of the order.]

That is the reasonable view. The contention for the

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liquidator really involves a reform of the law. The fact that in the section no date is specified accords with the view that the court has only to deal with future remuneration. There are other indications (though less strong) to show that the section is dealing with future remuneration only. One of these is that power is given to vary the order and amend it when a mistake has been made by the registrar or when some evidence not before him shows that the order ought to be varied. The receiver is bound by his bargain and he has no power to come to the court and ask to have past remuneration reviewed, though he can apply for a variation of any order made on the application of the liquidator. Again, a receiver might have died or retired, how then could the liquidator recover part of the past payments of remuneration ? Sections are clear where they are intended to affect the past : see s. 276 relating to misfeasance by an officer of the company and other sections such as ss. 256, 264 and 267 invalidating past events within a strict limit of time. Section 311 has been cited, but that has reference only to a receiver in default. In so far as this section is one for overriding contracts properly entered into, it should be narrowly construed as being a penal section and not allowed to operate retrospectively so as to inflict great hardship on a receiver. It should be given no meaning beyond what is clearly indicated : *Nokes* v. *Doncaster Amalgamated Colliers, Ld.* (1). The court is being asked to assume that s. 309 overrules the Law of Property Act, 1925, s. 101, sub-ss. 1 and 3.

Upjohn K.C. and *Brunyate* for the surviving receiver.

Andrew Clark K.C. replied.

MORTON L.J. This is an appeal by the liquidator of Greycaine, Ld. from a decision of Lord Uthwatt, who was, I think, Uthwatt J., when he heard the case but Lord Uthwatt when he gave his judgment. The respondents are Mr. Brigham, who is the present receiver appointed under a power in a debenture trust deed, and the legal personal representatives of Mr. Wilcock the deceased receiver. The appeal raises certain important questions as to the construction of s. 309 of the Companies Act, 1929, and the matter has been very fully and well argued before this court. I think it really comes down in the end to a short, though by no means easy, question of construction. The first question raised by the liquidator, though it seems doubtful whether this point was argued in the court below, was whether the remuneration of the receivers was validly fixed by the trust deeds and the deeds of appointment of receivers. I think Lord Uthwatt assumed that the remuneration was validly so fixed, but we have given leave to the liquidator to raise that argument in this court, it being an argument based on the construction of documents, and Mr. Upjohn for the respondents raised no objection to that question being argued.

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(1) [1940] A. C. 1014, 1031.

That being the first question, the second is whether, if the remuneration has been so fixed, the court has jurisdiction to reopen the matter at all under s. 309, and to re-fix, so to speak, the remuneration. That is a matter which had been discussed in certain text books. We were referred to Buckley on Companies, 11th ed., p. 200, and to a footnote in Halsbury's Laws of England (Hailsham Edition), vol. V, p. 516, note (*e*). We have not heard argument on that point, and I do not propose to express any view upon it. The learned judge has held that the court has that jurisdiction, and there is no appeal from his decision. I propose to leave the matter there in the absence of any argument, or any appeal, and to assume in favour of the liquidator that the court has power to fix the remuneration under s. 309, notwithstanding that the remuneration was duly fixed on the receivers' appointment.

The third question is, assuming that the court has jurisdiction to fix the remuneration where it has already been fixed by contract, as from what date can the court fix it. There are four possible dates suggested. The first (and this is the primary contention of the liquidator) is that the court can fix the remuneration as from the appointment of the receivers. The second and alternative contention which he puts forward is that the court can fix the remuneration to be paid as from the commencement of the winding-up. The third possible date is as from the date of the application made by the liquidator under s. 309. That is the date which the learned judge thought was the right date. The last possible date is as from the date of the court's order. There was no argument before the learned judge as to which one of the two last mentioned dates is right, assuming that one of them is the right date, because it would appear that there was no change of circumstances between those two dates in the present case. I think it is necessary, in arriving at a conclusion as to what the section means, to choose between those two dates, assuming that the court cannot accept either the date of the appointment of the receivers or the date of the commencement of the winding-up.

[His Lordship then stated the facts and continued :]

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Morton L.J.

I shall turn back now to the first question argued by Mr. Andrew Clark for the liquidator: was the receiver's remuneration validly fixed by the trust deeds and the appointments? In my view it was, and I cannot find any conflict between the provisions of the trust deeds and the appointments. Mr. Clark has pointed out that the statutory power under s. 101, sub-s. 1 (iii.), refers to the appointment of a receiver "of the "income of the mortgaged property, or any part thereof; "or, if the mortgaged property consists of an interest in income, "or of a rent charge or an annual or other periodical sum, a "receiver of that property or any part thereof." Then s. 109 sub-s. 3, provides, so far as is material: "The receiver shall "have power to demand and recover all the income of which he "is appointed receiver," and then certain means are specified by which he may do that. Coming to sub-s. 6, which is the most relevant sub-section, it is as follows: "The receiver shall "be entitled to retain out of any money received by him, for his "remuneration, and in satisfaction of all costs, charges, and "expenses incurred by him as receiver, a commission at such "rate, not exceeding five per centum on the gross amount of all "money received, as is specified in his appointment, and if no "rate is so specified, then at the rate of five per centum on that "gross amount, or at such other rate as the court thinks fit to "allow, on application made by him for that purpose." Reading the first trust deed in conjunction with s. 109, sub-s. 6, of the Law of Property Act, I think the effect is as follows: first of all, the receiver was to be entitled to pay the costs and expenses incurred by him. That is expressly provided for by the first trust deed, and in that respect the provisions of the first trust deed differ from the provisions of s. 109, sub-s. 6, where the "commission" is to cover the costs, charges and expenses of the receiver. Then, in addition to paying those costs and expenses, the receiver is to have remuneration at such a "rate" not exceeding that provided in the Law of Property Act, 1925, s. 109, as the trustee may from time to time determine. In my view, the reference to a "rate" refers to the latter part of sub-s. 6 which I have already read, and which begins with the words "a commission at such rate, not exceeding five per "centum on the gross amount of all money received, as is "specified in his appointment." I do not think one brings in at that point the first part of sub-s. 6. That sub-section is only referred to for the purpose of specifying the rate. Then, when one comes to the actual appointment, we find that it specifies that the receivers are to receive "for their remuneration a "commission at the rate of 5*l*. per cent. on the gross amount of "all moneys received by them," and, in addition, they are to have "all costs and expenses reasonably and properly incurred "by them." I omit the word "charges" for Mr. Clark has said that he makes no point of it. In my view the remuneration so fixed is not in excess of that authorized by the trust deed, on its true construction, and the remuneration of these receivers has been validly fixed by the trust deed and the appointments.

It being common ground that the order of the registrar must be discharged, and that the matter must be remitted to him, I now come to the question: what is the direction which should be given to the registrar? Counsel for the liquidator has contended that the direction should be that he is to fix the remuneration of the receivers from the date of their appointment, or, alternatively, that the direction should be that the receivers are entitled to remuneration from the date of their appointment down to the commencement of the winding-up in accordance with the scale of remuneration fixed by their appointment, and that as from the commencement of the winding-up the remuneration is to be fixed by the court. The construction of s. 309 of the Companies Act, 1929, short though it is, is not free from difficulty, but after carefully listening to the arguments addressed to us, I have come to the conclusion that I agree with Lord Uthwatt in thinking that the court cannot go back further than the date of the liquidator's application. I base that conclusion, as Lord Uthwatt did, primarily on the words "to be paid." "These words," said Lord Uthwatt, "point to regulating the course of events in "the future, not to the possibility of reviewing the past." With that observation I entirely agree. It is, however, a matter which has caused me some difficulty to understand why Lord Uthwatt, taking that view, should have taken the date of the application by the liquidator as the date from which the court can fix the amount of the surviving receiver's remuneration. It seems to me that, if the words "to be paid" are words referring to the future, the logical conclusion is that the court can only fix the remuneration of receivers as from the date of its order. The respondents have not argued against that part of the order which allows the registrar to go back to the date of the application by the liquidator, because that part of the order, I understand, will make no practical difference to them. It is, however, necessary for us to decide whether this is the right date. All that was said by Lord Uthwatt on that subject is: "Nor again are they (the parties) concerned with "the question whether what I have called the future means the "date of the application or the date of the order, but it is, in "my view, clear that the date of the application is the material "date." The learned judge did not, however, give any reasons for that conclusion.

Turning again to the section, I think one must bear in mind that there has ex hypothesi been an appointment of a receiver before the court exercises its power. The section refers only to any person who has been appointed as receiver under the powers contained in an instrument, so that the section is dealing with a case in which there has been a bargain between the company and the trustee for the debenture holders, and between the trustee and the receiver. I think it is not unfair to describe it, as Mr. Upjohn did, as a penal section, if the effect of it is that the court can take away from the receivers remuneration which they have already earned in pursuance of their bargain. Ordinarily a receiver takes his remuneration out of the moneys which he has received. He may work hard and try to sell a property, and fail, in which case, on a percentage remuneration, he gets nothing. On the other hand, if he does sell, directly he has received the proceeds of sale he has a right to his percentage. There is no difficulty at all in treating the section as referring only to the future. You merely find out what moneys the receiver has received up to the date of the order, and what remuneration he is entitled to retain under his bargain, and the court then says what is "to be paid" in the future. To my mind the very fact that there is no date mentioned in the section as the date from which the court may fix the amount of the receiver's remuneration is a strong indication that the court is not to go back to any earlier date than the order itself. The order is to deal with the future, and only with the future. The intention is, I think, to leave undisturbed that percentage which has already accrued to the receiver on the moneys collected by him. Mr. Upjohn relied upon other portions of the section in support of his argument, but, for my part, I think that the vital words are "to be paid," and it is on those words I found the view at which I have arrived. There are certain other matters which were referred to in argument which I think are of considerable importance. To my mind if the legislature had intended to empower the court to take away remuneration already earned by a receiver, it would have conferred that remarkable power in plain terms by words which plainly conferred that power. Mr. Andrew Clark agrees that his argument must imply that the receiver may be called upon to pay back moneys already received, and rightfully received, by him. It is, of course, possible that the legislature intended to give such a power, and the power is a discretionary one; but for my part I should not feel inclined to construe the section so, unless the words were plain, and to my mind they are reasonably plain the other way. One can easily think of circumstances where it would be a very great hardship on a receiver to have the whole matter suddenly reopened. For example, a receiver might have been carrying out his duties in accordance with his bargain for ten years. He might have expended a large part of his remuneration in paying surtax and income tax thereout, and in paying his staff and other expenses of every kind. He might then be faced with a demand for the repayment of the sums so received by him. Again, supposing a receiver had died, his executors would always have hanging over them this possible claim as a result of the exercise of its powers by the court under s. 309. Furthermore, if the section has the construction for which Mr. Andrew Clark contends, it is a striking fact that persons who were engaged in receiverships before the passing of the Act of 1929, would suddenly find that remuneration which they had contracted to receive, had retained and possibly had spent, could be taken away from them by the court. All these consequences would not deter me from giving that construction to the section if I thought it was the construction which the words most naturally bear, but I do not take that view. Mr. Upjohn referred us to the manner in which the legislature has made provision for the cases where persons are to be called upon to repay moneys already received by them. He referred in particular to the misfeasance section, s. 276. There a very careful provision indeed is made in regard to the repayment of moneys by officers of the company, under certain circumstances which I need not describe. The only provision in the Act which was suggested as having any application to the case of repayment of moneys received by a receiver was s. 311, sub-s. 1 (*b*), but that is a section which deals with a case where a default has arisen on the part of the receiver in failing to render proper accounts of his receipts and payments. I doubt very much whether that sub-section could be invoked for the suggested purpose, but, however that may be, I cannot believe that the legislature would have given a power to recall moneys from the receivers without making some clear provision as to how this was to be done.

To my mind the construction which best fits the words of the section is that the court can only fix remuneration as from the date of its order. The other possible alternative, which may be the right one, but which does not commend itself so much to my mind, is that the court can fix the remuneration as from the date of the application by the liquidator. To my mind the court is not empowered by the words of this section to go any further back. The construction I have put on the section, as it seems to me, follows exactly the wording of the section ; there is no need to imply anything, and no difficulty arises as to the date to which the court can go back. The section is dealing, and dealing only, with the future.

BUCKNILL L.J. I agree that this appeal should be dismissed for the reasons given by Morton L.J. in his judgment, and I have nothing to add.

COHEN L.J. I agree, and I only desire to add a word on one point. Mr. Andrew Clark bases his argument in substance on a passage from the speech of Lord Blackburn in *River Wear Commissioners* v. *Adamson* (1), where the learned lord said : " As long ago as *Heydon's* case (2), Lord Coke says that it was " resolved ' that for the sure and true interpretation of all " ' statutes in general (be they penal or beneficial, restrictive or " ' enlarging of the common law) four things are to be discerned " ' and considered : First. What was the common law before " ' the making of the Act ? Second. What was the mischief and " ' defect for which the common law did not provide ? Third. " ' What remedy the Parliament hath resolved and appointed to " ' cure the disease of the commonwealth ? And fourth. The true " ' reason of the remedy ; and then the office of all the judges is " ' always to make such construction as shall suppress the " ' mischief and advance the remedy '." The mischief which Parliament was considering in 1929, Mr. Andrew Clark says, was that, while, if any mischief arose from bargains of the character we are considering it occurred in the main before a winding-up supervened, when a winding-up supervened the interests of the unsecured creditors who had been unable to protect themselves came into being. He

(1) (1877) 2 App. Cas. 743, 764. (2) 3 Co. Rep. 7b.

said that this mischief could not be wholly removed unless we accepted his construction and construed the section as enabling the court to review the remuneration of the receiver as from the date of the first appointment of a receiver. This may be true. But I think there are a number of other considerations which may have weighed with Parliament. I will not go through them in detail. I think they have been all mentioned by Morton L.J. It is enough to say that amongst the considerations that Parliament may have taken into account was the undesirability in principle of disturbing bargains possibly acted on for many years before the commencement of the winding-up. I cannot help feeling if we were to put a forced construction, and I think it would be a forced construction, on the language of this section in order to remove completely the mischief defined by Mr. Andrew Clark, we should be neglecting that part of the speech of Lord Blackburn which immediately follows the passage which I have read. Lord Blackburn goes on to say: "But it is to "be borne in mind that the office of the judges is not to legislate, "but to declare the expressed intention of the legislature, even "if that intention appears to the court injudicious." I am not saying that I venture to criticize Parliament to that extent; I do say that I think the only construction to be placed on this section is that which has been indicated by my Lord, and I cannot find anything in the circumstances justifying us in making that departure which Mr. Andrew Clark's argument requires from the natural meaning of the words. For these reasons I agree that, subject to the question of the form of the order, the appeal should be dismissed.

Appeal dismissed.

The order of Lord Uthwatt discharging the registrar's order and remitting the matter to him was varied by the court directing that any order made by the registrar "is not to disturb "or relate to any remuneration to which the respondents "are entitled pursuant to the trust deed and instrument "appointing them receivers out of gross moneys received "by them up to the date of his order."

Solicitors: *Cosmo Cran & Co.; Rowney & Co.; F. C. Hampshire, Harpenden.*

H. C. G.

WYNN-PARRY J.

1946

Apr. 11.

In re CHATTERTON'S SETTLEMENT.
FOX *v.* POWELL.

Settlement—Power of appointment to children—Exercise of power by deed, subject to life interest—Power of revocation—Release and discharge of power—Implied revocation of previous appointment—Fund to pass in default of appointment.

By a marriage settlement made in 1902, a sum of 5,000*l.*, part of the settled funds was to be held by the trustees subject to the usual life interests of husband and wife therein upon trust, in certain events which happened, to pay the same unto such of three daughters of the wife by a former husband, as she should by deed, revocable or irrevocable, or by will appoint.

The husband died in 1910, and the wife by a deed of appointment made in 1913 directed that upon her death 1,000*l.* out of the 5,000*l.* was to be paid to one of her said daughters and the balance to another one. The deed was expressed to be revocable.

By a deed executed in 1924 the wife released and discharged all the sum of 5,000*l.* from the power of appointment to the intent that it should pass to the persons entitled in default of appointment, namely the three daughters:—

Held, that the release was an effective revocation of the deed of 1913, and that the fund passed in default of appointment.

ADJOURNED SUMMONS.

By a settlement, dated August 2, 1902, and made on the marriage of Hedges Eyre Chatterton and Florence Henrietta Croker a trust fund was settled on trust to pay the income to the husband during his life and subject thereto to the wife during her life and after the death of the survivor of them in the event (which happened) of there being no child of the said marriage on trust to raise and pay out of the trust fund the sum of 5,000*l.* between such of the three daughters of the said Florence Croker by a former marriage, namely Violet Emily Georgina Tuke, Florence Olive Joan Powell (formerly Dooner), and Constance Evelyn Nancye Elverson (formerly Stuart), as she might by deed revocable or irrevocable or by will appoint for their own absolute use, and in default of appointment in equal shares with a provision for hotchpot, and to transfer the balance of the trust fund to the said Hedges Eyre Chatterton and his personal representatives.

By a deed poll, dated June, 1906, the said Florence Henrietta Chatterton in exercise of the power conferred upon her by the settlement appointed that on the death of the survivor of them, the husband and wife without issue of their marriage, 2,000*l.*

part of the said 5,000*l.* should be paid to Florence Olive Joan Powell absolutely and she Florence Olive Joan Powell covenanted to settle such sum for the benefit of herself her husband and her issue. No power of revocation was reserved. Hedges Eyre Chatterton died on August 30, 1910. By a deed poll, dated April 1, 1913, the said Florence Henrietta Chatterton after a recital of the previous appointment and in further exercise of it, appointed that 1,000*l.* part of the 5,000*l.* should be paid to Constance Evelyn Nancye Elverson absolutely and that the whole of the residue of the 5,000*l.* should be paid to Florence Olive Joan Powell absolutely. This deed contained a power of revocation and new appointment.

By a release, under seal, dated February 4, 1924, the said Florence Henrietta Chatterton purported to release and discharge the sum of 5,000*l.* from the said power of appointment, to the intent that the same should be absolutely discharged from such power and subject to her life interest should devolve upon her three daughters in equal shares according to the trust in default of appointment. The release did not recite either of the previous appointments. Violet Emily Georgina Tuke died on January 24, 1925 and her will, dated July 19, 1923, was duly proved by Bryan Edward Tuke, one of her executors.

Florence Henrietta Chatterton died on January 26, 1930.

The summons was taken out to decide certain questions arising as to the effect of the settlement and other documents. On the first question the learned judge held that the appointment of 1906 was ineffectual as being a fraud upon the power. The second question was whether the release of 1924 had the effect of revoking the appointment of 1913.

Pennycuick for the plaintiffs.

G. A. Rink for Mrs. Powell. The release and discharge of the power in 1924 did not operate to revoke the previous appointments, but only to prevent any further exercise of it and preserve the status quo. To revoke the appointments a definite intention to exercise the power must be shown, and here there is no such intention. Neither of the appointments made is recited or referred to in this deed of release. All that the donee did was to renounce her own rights, and not to alter existing rights, or exercise any power of appointment. See Farwell on Powers (3rd ed.), pp. 218, 219, 223; Halsbury's Laws of England (Hailsham Ed.), vol. xxv., p. 549; *Garth* v. *Townsend* (1);

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(1) (1869) L. R. 7 Eq. 220.

Pennefather v. *Pennefather* (1); *Langslow* v. *Langslow* (2); *In re Jack* (3); *In re Horsfall* (4).

C. L. Fawell for the defendant Mrs. Elverson. This release, on its true construction is an express revocation of the appointment of 1913, which was revocable. The sum of 5,000*l.* is expressed to be discharged from the power, and that cannot be done without not only releasing the power for the future but revoking what had been done under the power in the past: *In re Thursby's Settlement* (5), *Andrews* v. *Emmot* (6).

E. Blanshard Stamp for the defendant Bryan Edward Tuke. The release is only consistent with the exercise of the power of revocation. The cases cited by Mr. Rink are distinguishable; they were all cases on the question whether or not there was an intention to exercise a power. See *Irwin* v. *Rogers* (7).

WYNN-PARRY J. The circumstances leading up to the second question in this summons may be shortly stated as follows. On April 1, 1913, Mrs. Chatterton executed a deed poll by which after reciting the settlement and after reciting the appointment of June 1, 1906, with which I have already dealt, and after reciting her desire to make an appointment in respect of the 5,000*l.* referred to in the settlement, she proceeded as follows: in exercise of the power for the purpose given to her by the settlement and of every other power enabling her in that behalf "she doth hereby appoint and direct that on the "decease or re-marriage (whichever event shall first happen) "of herself the said Florence Henrietta Chatterton (1.) the "sum of 1,000*l.* portion of the aforesaid sum of 5,000*l.* provided "for this purpose" by the said settlement "shall belong and "be paid to Constance Evelyn Nancye Stuart," one of the three daughters of her former marriage "her executors "administrators and assigns absolutely." Then (2.) "Subject "to the above recited deed poll"—that was the first appointment—"the whole of the residue of the aforesaid sum of 5,000*l.* "shall belong and be paid to the said Florence Olive Joan "Dooner her executors administrators and assigns absolutely." Then follows a power of revocation, which I need not refer to in detail.

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(1) (1873) I. R. 7 Eq., 300, 308.

(2) (1856) 21 Beav. 552.

(3) [1899] 1 Ch. 374.

(4) [1911] 2 Ch. 63.

(5) [1910] 2 Ch. 181, 186.

(6) (1788) 2 Bro. C. C. 298.

(7) (1848) 12 Ir. Eq. R. 159.

On February 4, 1924, Mrs. Chatterton executed a release in the form of a deed poll. By that document the settlement was recited but no mention is made either of the appointment of 1906 or the appointment of 1913. The relevant part of this document starts with the last recital and from there to the end it reads as follows: "And whereas the said Florence Henrietta "Chatterton desires to release her said powers of appointment "over the said sum of 5,000l. now these presents witness that in "pursuance of the said desire she the said Florence Henrietta "Chatterton hereby releases and for ever discharges the said "sum of 5,000*l.* from the said recited powers to appoint the same "to the intent that the said sum of 5,000*l.* may be absolutely "discharged from the said powers of appointment and that she "the said Florence Henrietta Chatterton may be absolutely "precluded from exercising the said powers or any of them and "that the said sum of 5,000*l.* may subject to her said interest "for life or until remarriage devolve upon and become vested "in her said three daughters in equal shares as tenants in "common according to the provisions in the marriage settle-"ment contained in default of appointment thereof."

In these circumstances the second question raised by the summons is whether that release of February 4, 1924, is effectual to revoke the appointment made by the document of April 1, 1913. In my view this question is first and last a question of what is the true construction of the relevant part of the document of 1924 which I have read. Mr. Rink in an interesting argument urged on me that I should apply a principle established over a long number of years, which is not in the least disputed by Mr. Fawell or Mr. Stamp, but which, to be applicable to this case, presupposes that I am not at liberty so to construe this document that its effect is that, either expressly or by implication, the act of Mrs. Chatterton in releasing the 5,000*l.* from her power of appointment was not effectual to revoke the previous appointment. Mr. Rink urges that I should look at it in this way: this is a document by which Mrs. Chatterton does not seek to dispose of all her rights by her own act. It is not a case of purported exercise of the power which for some reason is defective: it is nothing more than an act the effect of which is to crystallize the position as it then existed. In support of his argument he cited cases such as *Langslow* v. *Langslow* (1), *Garth* v. *Townsend* (2) and *Pennefather* v. *Pennefather* (1), where there is a comprehensive statement of the law on that aspect of the matter. But in my view there is nothing in any of the authorities to prevent me approaching this document and in the first place construing the language as it stands apart from, and neither guided nor embarrassed by, any authority. I am fortified in that view by the two authorities to which Mr. Fawell and Mr. Stamp drew my attention, the earlier case of *Andrews* v. *Emmot* (2) and the later case of *In re Thursby's Settlement* (3), where it is made clear in the judgment of Farwell J. that in order that a power of revocation should be effectively exercised there need not be any express reference to the power of revocation in the first deed which has the effect of operating as a revocation.

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(1) 21 Beav. 552.

(2) L. R. 7 Eq. 220.

I now turn to the release of February 4, 1924. In the recital Mrs. Chatterton says quite clearly that she desires to release her powers of appointment over the fund of 5,000*l*. Then she says that in pursuance of the desire she thereby releases and for ever discharges the said sum of 5,000*l*. from the recited powers of appointment. Pausing there, I take the view that those words, whether they are treated as an express revocation of the appointment of 1913 or as an implied revocation, are clearly operative upon that document. I cannot see how the 5,000*l*. can be for ever discharged from the recited powers unless this document sweeps out of the way the earlier and revocable document of 1913. Therefore, even stopping at that early stage in the operative part, in my judgment the words down to the point I have read are effective to operate as a revocation of the appointment of 1913. But the matter is underlined and emphasized by what follows, because in this particular clause of the operative part Mrs. Chatterton goes on to express three distinct intentions: First that the said sum of 5,000*l*. may be absolutely discharged from the powers of appointment; secondly, that she may be absolutely precluded from exercising the powers thereunder and, thirdly, that the sum of 5,000*l*. may, subject to her life interest, devolve upon and become vested in her three daughters in equal shares as tenants in common. Reading that clause as a whole, in my view the inescapable result is that the force of that language is to revoke the appointment made by the appointment of 1913 in view of the revocation reserved by that document. In those circumstances I will declare in answer to question 2 of the summons that the release of February 4, 1924, was effectual to revoke the appointment of April 1, 1913.

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(1) 7 I. R. Eq. 300.

(2) 2 Bro. C. C. 298, 303.

(3) [1910] 2 Ch. 181, 186.

WYNN-PARRY J.

1946

CHATTERTON'S SETTLEMENT, *In re.*

FOX *v.* POWELL.

Solicitors: *Barfield, Child, Barry, Lucas & Sons; Blount, Petre & Co.*

H. L. L.

In re EARL OF CHICHESTER'S WILL TRUSTS.

PELHAM AND OTHERS *v.* CHICHESTER (COUNTESS) AND OTHERS.

EVERSHED J.

1946

April 2, 3, 4.

Will—Soldier—Oral instructions to solicitor as to dispositions in will—Note by solicitor—Admission of note to probate—Validity—Exercise of special power of appointment—Wills Act, 1837 (7 *Wm.* 4 & 1 *Vict., c.* 26), *ss.* 7, 9, 10, 11—*Wills (Soldiers and Sailors) Act,* 1918 (7 & 8 *Geo.* 5, *c.* 58), *s.* 3.

Section 11 of the Wills Act, 1837, enabling soldiers on actual military service to make wills disposing of personal estate without complying with ss. 9 and 10, covers not only their own absolute property, but also personal property over which they have powers of appointment, whether special or general.

Semble, Section 3 of the Wills (Soldiers and Sailors) Act, 1918, likewise covers real estate of which a soldier has power to dispose by any power of appointment.

ADJOURNED SUMMONS.

By his will, dated June 6, 1908, the sixth Earl of Chichester devised certain freeholds in strict settlement which entailed certain powers to jointure and to create portions which were exercisable by his successors in title. By a codicil dated May 29, 1923, he recited that the freeholds had become vested in Chichester Estates, Ld., and that therefore the property which would pass under his will was not the freeholds but his shares in that company, and he made applicable the provisions of the will in the proportions in which they originally applied to the freeholds. On November 14, 1926, the sixth earl died. His elder son, the seventh earl, survived him for only seven days and the eighth earl thereupon became tenant for life and entitled to exercise the powers. On January 28, 1944, the solicitor to the eighth earl, who was then a captain in the Scots Guards, took oral instructions from him about the making of his will and made the following note of those instructions.

EVERSHED J.

1946

EARL OF CHICHESTER'S WILL TRUSTS, *In re.*
PELHAM *v.* CHICHESTER (COUNTESS).

“ Lord Chichester H.Q. 6th Guards Tank Brigade Home
“ Forces. Lord C. has only one daughter and his wife expect-
“ ing another child about April. He understands that if he dies
“ without a son assets of Chichester Estates Co. which includes
“ the freeholds pass to an uncle and then to uncle's son.
“ He Lord C. wants create jointure of 1,000*l.* p.a. in favour of
“ his wife . . . . Out of parents' marriage settlement moneys
“ and late earl's residue and his free moneys he wishes his
“ two sisters to have 300*l.* p.a. each gross to be increased to 500*l.*
“ p.a. to survivor. Whether a son or not. The residue whether
“ there is a son or not he wishes to go to his children equally,
“ his idea being that his daughter should be provided for to the
“ best of his ability. If there is a son he will of course inherit
“ the freeholds and Lady Chichester will probably be in a
“ position to leave fairly substantial sums to her children and
“ would probably make fairly adequate provision for her son.
“ Lord Chichester feels strongly that his two sisters and his
“ daughter should as far as possible be provided for by him.
“ If there is a son Lord Chichester still wants jointure in favour
“ of his wife. Lord Chichester jointure 1,000*l.* to wife—
“ 500*l.* during mother's lifetime. Marriage settlement and
“ residue :—300*l.* gross to each sister for life, to be increased
“ to 500*l.* to survivor. Residue to children equally. Scots
“ Guards H.Q. 6th Guards Tank Brigade. Home Forces.
“ Summary : Jointure 1,000*l.* to wife 300*l.* p.a. gross to each
“ sister 500*l.* to survivor. Residue equally amongst his
“ children. Exors & Trustees. C. Bullock. Wm. Piercy.”
The eighth earl had been mobilized for active service and on February 21, 1944, was killed. On July 25, 1945, the court ordered that the note be admitted to probate as his will and on October 27, 1945, probate was granted. By this summons the trustees of the sixth earl's will asked whether the eighth earl's will operated as an exercise or partial exercise of his powers under the sixth earl's will (*a*) to charge a jointure in favour of his widow, (*b*) to raise portions for his children.

A. C. Nesbitt for the trustees.

D. LL. Jenkins K.C. and *Jopling* for the eighth earl's widow and infant daughter. The document before the court is capable of exercising the powers and has exercised them. The earlier authorities deal with persons abroad exercising general or special powers by will : [they referred to *In re Price* (1)]. With regard, however, to soldiers' informal wills, the authorities extend only to enabling them to exercise a general power. There would appear to be no case of a soldier's will having exercised a special power, but the ratio decidendi is the same. There are other cases of persons abroad, or not in England, in which special powers have been held to be exercised by will. [They referred to *In re Walker* (1), *In re Simpson* (2), *In re Wilkinson's Settlement* (3).] In *In re Wernher* (4) Younger J. dealt at length with the question whether an infant soldier could make a valid will. He found that he could not, but that it was the recognized practice of the Probate Division to admit infant soldiers' wills to probate, that probate of an infant soldier's will must be treated as conclusive that he had testamentary capacity and that the will, while the probate remained unrevoked, must be treated as valid and that the will before him operated to exercise a general power of appointment over personalty. The combined effect of the Wills Act, 1837 and the Wills (Soldiers and Sailors) Act, 1918, is to relieve a soldier from the formalities imposed by s. 9 of the Wills Act, 1837 on wills generally and, by s. 10, on the exercise of special powers of appointment. The effect of ss. 9, 10 and 11 together is that a person not privileged as a soldier on active service cannot make a valid will unless it is executed by him and attested by two witnesses. The soldier can make a will dealing with his own property without complying with the formalities and s. 10 does not operate to impose on him a distinct and substantive requirement so far as the will operates to exercise a power of appointment. In the present case, the sixth earl provided that the powers to jointure and to raise portions should be exercised by will or codicil. The solicitor's note of the interview with the eighth earl has been admitted to probate as a will. Therefore it is capable of exercising those powers. The question whether the powers of appointment have been exercised is one of construction, the answer to which is to be collected from the terms of the will. [Counsel then dealt with the terms of the will in argument which does not call for report.]

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(1) [1900] 1 Ch. 442.

Neville Gray K.C. and *Ungoed-Thomas* for the ninth earl. The document is not capable, under the Wills Act, 1837 and the Wills (Soldiers and Sailors) Act, 1918, of exercising these special powers. A soldier can dispose by informal will of his own property and can exercise a general power of appointment over

(1) [1908] 1 Ch. 560.

(2) [1916] 1 Ch. 502.

(3) [1917] 1 Ch. 620.

(4) [1918] 1 Ch. 339, 2 Ch. 82.

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personalty and over real estate. That follows from the Wills Act, 1837, the Wills (Soldiers and Sailors) Act, 1918, and the cases: but the authorities do not go further than that. In both those Acts, the constant reference is to the disposition of personal estate. Property over which a man has a general power of appointment is in many ways regarded as his own, but that is not the case with property over which he has a special power of appointment: that is not his own at all. [They referred to *In re Wernher* (1).] Thus, the privileges given by the Wills Act, 1837 to soldiers in actual military service covers their own personal property. It does not, in so many words, extend to the personal property of other people, and it certainly does not extend to appointments by special powers. It is between general and special powers that the real gulf lies. Therefore, an appointment made by an English will must comply strictly with s. 10. Section 11 does nothing to alter that. True, general property over which a man has a general power of appointment can properly be treated as his personal estate: see, especially, s. 27 (2). That, however, does not apply to property over which he has a special power of appointment. True, s. 11 is a proviso to ss. 9 and 10 and, possibly, to s. 7 also: it does not, however, cover special powers of appointment, so that an appointment by will under s. 10 will not be valid unless it complies with s. 9. The argument that the sixth earl provided that the powers should be exercised by will or codicil, that the solicitor's note was admitted to probate as a will and that it can therefore exercise the powers has not given full consideration to the meaning of the word "appoint." "Appoint" must here mean "appoint by will or codicil" which, within s. 11, is effective to appoint. This document does not comply with s. 11. As to s. 3 of the Wills (Soldiers and Sailors) Act, 1918, it is exceedingly involved. If its meaning is simply that soldiers in actual military service can dispose of realty in the same way as they can of personalty, it is a very complicated way of saying so, and a much simpler course would have been to amend s. 11.

(1) [1918] 1 Ch. 339; 2 Ch. 82.

(2) By s. 27 of the Wills Act, 1837: ". . . . a bequest of the "personal estate of the testator, "or any bequest of personal property described in a general "manner, shall be construed to "include any personal estate, or "any personal estate to which "such description shall extend "(as the case may be), which he "may have power to appoint in "any manner he may think "proper, and shall operate as an "execution of such power, unless "a contrary intention shall appear "by the will."

Jopling in reply. It is not necessary for the will to comply with s. 10. It is a valid will, having been admitted to probate, and that is all that is required. If that contention is incorrect, then s. 10 still does not apply because it is not made to apply to a soldier's will at all: that is to say, it applies to the will of a civilian. The whole scheme of the provisions with regard to soldiers on actual military service is that their wills need not be formal in accordance with s. 9; and, that being so, they need not comply with s. 10 either; that is to say, an appointment made by will need not, to be valid, be executed in accordance with s. 9. That is shown by the cases dealing with wills of personalty made by persons domiciled abroad. In s. 11, the words "his personal estate" mean any personal estate of which a soldier on actual military service has power to dispose. Therefore, on the true construction of the section, a soldier's will, properly so called, is as competent to exercise a general or special power of appointment over personal property as it is to dispose of his own absolute personal property. The difficulties created by s. 10 with regard to appointment do not arise when once the will has been admitted to probate.

EVERSHED J. referred to the material sections of the Wills Act, 1837, and to certain arguments which do not call for report. His Lordship then proceeded: I am myself strongly inclined to the view that, notwithstanding s. 10 of the Act, a special power to appoint personalty by will may be validly exercised by any instrument in fact admitted to probate here as a will. But I am content to base my decision on the ground that s. 11 on its true construction, gives to a soldier power, by nuncupative will, not only to dispose of his own absolute property, but also to exercise powers of appointment, general or special, over personal property. That conclusion emerges in my judgment from the reasoning in *In re Wernher* (1) and *Godman* v. *Godman* (2). In *In re Wernher* (1) the question was whether a serving soldier, who was an infant, validly exercised by nuncupative will a general power of appointment over a substantial sum of personalty. The Wills (Soldiers and Sailors) Act, 1918 had not been passed when the case came before Younger J., who felt considerable doubt whether s. 11 of the Wills Act, 1837, was a proviso to s. 7 so as to enable a serving soldier not only to disregard the requirement as to form of s. 9, or of ss. 9 and 10, but also to make a will when a minor. That question was set at

(1) [1918] 1 Ch. 339; 2 Ch. 82. (2) [1920] P. 261.

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rest before the case went to the Court of Appeal by the passing of the Wills (Soldiers and Sailors) Act, 1918, by virtue of s. 1 of which a soldier on active service can make a will as provided by s. 11 of the Wills Act, 1837, notwithstanding minority. In the Court of Appeal, therefore, was directly involved the question whether by virtue of s. 11 a serving soldier could exercise a general power of appointment; and it is said quite fairly that that point does not arise in the present case, in which the question is whether he can exercise a special power. And it is true, as the Court of Appeal observed, that the distinction between a man's own personal property and personal property over which he has a general power of appointment is in many respects without substance; whereas, as Mr. Ungoed-Thomas, for the ninth earl, contended, the distinction between property over which there is a general and property over which there is a special power of appointment is a real one. On the other hand it is equally true that, in *In re Wernher* (1), the judges considered the history of s. 11, and founded their decision, at least in part, on the view that the section was designed to preserve a privilege which existed before the passing of the Statute of Frauds and which was historically not confined to the disposition of a soldier's own absolute property, but extended to any property over which he had a power of appointment, whether general or special. Swinfen Eady L.J., delivering his judgment in the Court of Appeal, referred (2) to the earlier history, which, conveniently summarized, is as follows: until the Statute of Frauds, it was competent to make a will of any property, real or personal, without any written form—indeed, orally. The requirements of the land law caused the passing of the relevant sections of the Statute of Frauds, which made it necessary that wills—both devises of land and wills of personalty—should follow certain forms: but s. 23 of that Act provided that soldiers' wills with regard to their "movables, wages and "personal estates" might still be made as they had hitherto been made. Swinfen Eady L.J. at that point observes that the expression "his movables, wages and personal estate" was directed to the distinction between personalty and land, not to any distinction between the soldier's own property and personal property over which he had a "general" power of appointment. The use of the limiting word "general" was in the context clearly because that was the point in the action. I say that because in other parts of his judgment Swinfen

(1) [1918] 2 Ch. 82.

(2) Ibid. 90.

Eady L.J. uses the wider phrase "a power of appointment." I read, for example, the following passage (1): "Again, if the contention of the appellants were correct, a soldier even of full age could not appoint personal property by an informal will. The Wills Act requires a will to be attested by two witnesses, and if the privileges of soldiers are only preserved with regard to their own personal property, an appointment by a soldier by an unattested will would fail, although the instrument creating the power only required an appointment 'by will,' and although an unattested will of a person domiciled abroad, and valid by the law of such person's domicile, would have been in such a case an effective appointment." I read also the next short passage, in which he deals with s. 3 of the Wills (Soldiers and Sailors) Act, 1918, to which I shall refer later. "Again, the new Act, by s. 3, extends the power of soldiers to dispose of real estate either by devise or appointment, although under twenty-one years of age, where the disposition would have been valid if of personal estate. It would be strange if in such circumstances an infant soldier could not validly appoint personal estate over which he had a general power of appointment." Again, I think that the word "general" is introduced because the question of the exercise of a general power was the point raised by the case.

Bankes L.J. said (2): "It seems to me that, by the use of the words 'will or codicil' simply, he"—that is, the person creating the power of appointment—"intended nothing further than that the donee of the power should be of testamentary capacity and that he should exercise the power by a testamentary instrument which complied with the requisites of the English law in reference to form and method of execution." Then, after dealing with the facts of the case, he said: "The argument for the appellants rests entirely upon the point that s. 11 uses the expression 'his personal estate,' and great emphasis is laid upon the word 'his,' and it is suggested that, when the section uses the expression 'his personal estate,' it is intended to draw a distinction between personal estate which belonged to a soldier testator and personal estate over which he had only a general power of appointment. In my opinion that is not the true construction to be placed upon the section. It seems to me that the words 'his personal estate' are there used without it being

(1) [1918] 2 Ch. 92.

(2) Ibid. 93.

"intended that any special sigificance should be attached to the "word 'his,' and merely with the object of drawing a very "necessary distinction between real estate and personal "estate . . . ." and then he states his reasons for coming to that conclusion. Again, in my view, the reference to "general "power" is attributable and attributable only to the fact that it was with a general power that he was concerned in the action. There was, in my view, no intention to distinguish between general and special powers of appointment. Finally, I refer to the judgment of the third member of the court, Neville J., who said (1): "I think, however, that we may infer an "intention on the part of the legislature in that section to "preserve the privileges of soldiers upon active service against "the disabilities imposed by the Wills Act, and I say so "because I think that, if there had been any real intention to "distinguish between the personal estate of a soldier and the "personal estate over which he had a power of appointment, "there would inevitably have been found an express reference "to such a distinction, and it would not have been left to be "inferred from the character of the words used in s. 11. The "distinction between personal estate which a man can bequeath "and personal estate which he can appoint by will as he pleases "is an extremely subtle one, and, although for certain purposes "it is necessary to bear the distinction between the two in mind, "for practical purposes it does not seem an unlikely use of "words that both classes of property should be referred to as "'his personal estate.' In the connexion in which these words "'his personal estate' are found in the Wills Act, I think that "they may well be construed as referring to both characters of "property, both personal estate which a man may bequeath "and personal estate which he may appoint, and I think that "in giving that construction to the words used we are fulfilling "the intention of the legislature."

Godman v. *Godman* (2) dealt with a will which a soldier made by which he purported so to deal with real and personal estate that they were necessarily involved together. The will was incompetent to dispose of real estate because the Wills (Soldiers and Sailors) Act, 1918, had not been passed and the question before the court was whether the disposition had so involved real with personal estate as to be inadmissible to probate. The Court of Appeal, by a majority, decided against the grant. The significance of the case for present purposes is that the

(1) [1918] 2 Ch. 82, 94.

(2) [1920] P. 261.

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judges again considered the historical reasons for the material section of the Wills Act, 1837, and, in my judgment, their observations on that matter are in line with what was said in *In re Wernher* (1). Lord Sterndale M.R., referring to the position before the passing of the Statute of Frauds, said (2): "The Wills Act, 1837, repealed the provisions of the Statute of "Frauds as to nuncupative wills, and required all wills to be in "writing and attested with certain formalities mentioned "therein, but by s. 11 continued the privileges previously "granted to soldiers on actual military service. The effect of "this legislation in my opinion is to leave the wills of soldiers "subject to the same principles as those relating to all wills of "personalty before the passing of the Statute of Frauds and the "Wills Act." Then he referred to the examination of the earlier principles, which he said that he had had the advantage of reading in the judgment to be delivered by Scrutton L.J., and he said that he agreed with that examination and the statement of principles to be obtained from it. On that matter, indeed, all three members of the court were agreed. I refer therefore to that part only of Scrutton L.J.'s judgment. After referring to the Statute of Frauds, he said (3): "A soldier "therefore after the Act"—that is, the Statute of Frauds—"(1.) could not make a will as to land except in writing with "three witnesses, (2.) could make a will as to personalty in "writing without any particular formalities, none being then "imposed on written wills, (3.) could still make an oral or "nuncupative will with sufficient witnesses disposing of "personalty, but not of realty, free from the restrictions of the "Statute of Frauds." Later, he said: "When the Wills "Act repealed the provisions of the Statute of Frauds as to "nuncupative wills, and required all wills to be in writing "attested with certain formalities, s. 11 of the Wills Act still "provided that any soldier being on actual military service "might dispose of his personal estate as he might have done "before the making of that Act. The soldier therefore "remains at liberty to make an informal oral or written will "of personalty, realty requiring the formalities of the Wills "Act, 1837, and both are frequently described in the cases as "'nuncupative,' a term originally applied to oral wills only."

I venture to think that the statements which I have considered cannot be regarded as mere obiter dicta. I regard them as authoritative views, based on the history of the matter, of the true construction of s. 11 of the Wills Act, 1837. Therefore, even if I disagreed with them—which I do not—I could not, in this case, express a view which would conflict with those statements, and which, at best, would create an exceedingly fine distinction for present purposes between the exercise of general and the exercise of special powers of appointment. I cannot think that so to do would have been within the intention of the legislature. I conclude, therefore, on this part of the case, that the proviso in s. 11 enabling soldiers on actual military service to make wills of personal estate without complying with ss. 9 and 10, covers not only their own absolute personal property, but also personal property over which they have powers of appointment, whether special or general.

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(1) [1918] 2 Ch. 82.
(2) [1920] P. 261, 269.
(3) Ibid. 280.

As s. 3 of the Wills (Soldiers and Sailors) Act, 1918, has been mentioned, I make, in conclusion, some observations about it. It was suggested in argument that, if sub-s. 1 was intended merely to enable soldiers to dispose of realty as of personalty, the form of words used was very elaborate and that it would have been simpler merely to amend s. 11 of the Wills Act, 1837. Such an amendment of s. 11 would, however, have been wholly ineffective, since, before the passing of the Wills Act, 1837, soldiers had no special privileges with regard to making wills of land. I therefore reject the suggestion that this form of words is designed so to limit the testamentary disposition of realty that it shall cover only real estate belonging to the testator. In my judgment, the section plainly enables a soldier to make a will disposing of real estate, be that real estate wholly and absolutely his, or be it the real estate of another of which he has power to dispose by any power of appointment. And if this is right Mr. Neville Gray's contention would lead to the strange result that a soldier has power to dispose by nuncupative will of all kinds of property belonging to him or subject to powers of appointment vested in him, save only personal property over which he has a special power of appointment. That is a conclusion from which the mind revolts and which conflicts with the views of Swinfen Eady L.J. in the passage which I have read at the close of his judgment in *In re Wernher* (1). In my judgment, s. 3 supports the view expressed by the learned judges in *In re Wernher* (2) and *Godman* v. *Godman* (3) with which I respectfully agree. It supports the view

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(1) [1918] 2 Ch. 82, 92.
(2) [1918] 1 Ch. 339 ; 2 Ch. 82.
(3) [1920] P. 261.

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that s. 11 of the Wills Act, 1837, was intended to enable a soldier, by these informal wills, to dispose of personalty which belonged to him or over which he had a power of appointment, general or special. I conclude, therefore, that the informal will now before me was capable of exercising powers to jointure and to raise portions if its language was appropriate to those purposes.

[The learned judge then dealt with the terms of the will in detail and held that the will did operate to charge a jointure in favour of the widow, but did not operate to raise portions for the children. The costs were ordered to be taxed as between solicitor and client and paid out of the sixth earl's estate in due course of administration.]

Solicitors: *Markby, Stewart & Wadesons.*

K. R. A. H.

In re SIMSON.

FOWLER *v.* TINLEY.

ROMER J.

1946

May 10, 15.

Charity—Will—Gift of residue to vicar of named church "to be used for "his work in the parish"—Validity.

A testatrix, by her will, gave the residue of her estate to the vicar of a named church "to be used for his work in the parish":—

Held, that the gift was a gift to the vicar to be used for the purposes of such part of his work (namely, his work in connexion with the cure of souls in the particular district) as lay within the particular parish, and that it was a valid charitable gift.

Farley v. *Westminster Bank* [1939] A. C. 430, distinguished.

ADJOURNED SUMMONS.

By her will, dated November 26, 1938, a testatrix gave the residue of her estate "to the Vicar of St. Luke's Church, Rams-"gate, to be used for his work in the parish." The testatrix died on February 1, 1943, and the will was proved on April 12, 1943.

A summons was taken out by the executors to determine whether the gift was a valid charitable gift.

Tonge for the plaintiffs.

Gray K.C. and *Jopling* for the residuary legatee. This is a

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valid gift of residue. It is a clear charitable gift. *Farley* v. *Westminster Bank* (1) is the only authority which presents any difficulty and that case has nothing to do with the wording of this will. "Parish work" is a much wider and more extensive phrase than a vicar's "work in the parish". It is clear that the whole duty of a vicar, as such, is the cure of souls: see Halsbury's Laws of England, 2nd ed., vol. XI., pp. 519, 663, 839, 840; and Cripps on Church and Clergy, 8th ed., p. 179. This testatrix gave money for the vicar's work (namely, the cure of souls) and said that it was for work in the parish, thereby excluding work outside the parish. The remarks of the lords justices, at the hearing in the Court of Appeal of the case above referred to (1), apply only to cases where such words as "parish "work" are to be found. Here, the words "for his work" do not mean such work as the vicar chooses to do, but the work attached to his office, which must be done by the vicar as such.

Danckwerts, for the Attorney-General, supported the argument on behalf of the residuary legatee.

Fawell for the Treasury Solicitor. There is no difference between a gift to the vicar for his "parish work" and a gift to him for his "work in the parish." He referred to *In re Garrard* (2). In *Farley* v. *Westminster Bank* (1) it was held that the words "parish work" could not be narrowed down so as to come within the limited meaning of "charitable" as used in the law. That is the whole substance of the case. In the present case, therefore, the words "for his work in the parish" defeat the gift and it is consequently invalid. In the argument on behalf of the residuary legatee the distinction between work and duty has been ignored. If, on the other hand, the gift is a gift to the vicar and churchwardens alone, it is a gift for ecclesiastical purposes in the parish and is valid (see *Thornber* v. *Wilson* (3) and *In re Delany* (4)). A definition of ecclesiastical purposes is to be found in s. 75, sub-s. 2, of the Local Government Act, 1894. Work in the parish extends beyond the duties of the vicar.

D. H. McMullen and *Harold Lightman* appeared for other parties interested.

ROMER J. The question is whether a gift framed in these terms, which is not to a named individual for the furtherance

(1) [1939] A. C. 430; [1938] Ch. 482.

(2) [1907] 1 Ch. 382.

(3) (1855) 3 Drew. 245; 4 Drew. 350.

(4) [1902] 2 Ch. 642.

of that individual's work, but to the holder of an office, namely, the vicar of St. Luke's Church, Ramsgate, is a good gift or not.

The gift is good if its objects are sufficiently well defined, that is to say, ascertained or ascertainable, or if the gift is charitable, although not otherwise sufficiently defined; but, if neither of those qualities is to be attached to the gift, the gift fails, and for this reason, that it is given to the vicar, not for his personal use or benefit, but as trustee; and a trust is not valid unless it is either sufficiently definite to be executed by this court or is charitable.

I have the assistance of authority to some extent and, in the first place, it seems quite plain, from the decision of Joyce J., in *In re Garrard* (1), that a legacy simpliciter to the vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes. That is the view expressed by Joyce J., founding himself on two earlier authorities, namely, *Thornber* v. *Wilson* (2) and *In re Delany* (3), and I accept that as a true and correct statement of the law. The reason is, I think, to be found on considering what are the functions of a vicar. On that question Clauson L.J. in *In re Ashton* (4) gave a short, but to my mind, comprehensive summary: "It seems to me material to bear in mind that "the functions of the vicar of the church can be summed up "in this, that he has the cure of souls in the particular district, "parish or ecclesiastical district which is the locus of his "benefice." Taking that statement, it would appear that the functions of the vicar of the church, as so stated, are definite, and that they are charitable. Accordingly no difficulty arises, or would arise, where a gift was made to the vicar of a particular church simpliciter.

Apart from *In re Garrard* (1) I have had guidance from *In re Ashton* (4) for a further proposition, as it seems to me, also laid down by Clauson L.J., but before reading it, in order to make it more intelligible I may say that the gift which the court was there considering was a gift of residue to the respective vicars and churchwardens of two named churches for parish work. The case, which went to the House of Lords, was eventually decided on the ground that the gift, framed as it was, was too wide to be good. That was the view of the Court of

(1) [1907] 1 Ch. 382.

(2) (1855) 3 Drew. 245; 4 Drew. 350.

(3) [1902] 2 Ch. 642.

(4) [1938] Ch. 482, 501.

Appeal by a majority and that was the unanimous view of the House of Lords.

But Clauson L.J., who dissented, said in the course of his judgment: "The gift is to them for parish work, but in the "context I feel driven to the conclusion that 'for parish work' "means 'for their parish work.' If a man has a particular "function and you give to him, under the title of the office "which involves that particular function, a gift for some work, "prima facie, it would be for the work which he has to perform "by reason of the office he fills; and I feel no difficulty in so "construing these words, construing them, that is to say, as a "gift to the vicar and churchwardens for their parish work, "they being ecclesiastical officers of this parish. I think it "would be agreed that if I am right in so construing the words, "and if the gift is for the parish work of the vicar and church-"wardens, that is to say, to finance the vicar in the various "multifarious duties which are covered by his duty to care for "the souls of his parishioners—what is legally termed for the "cure of souls—and to finance the churchwardens in their "duties, of furnishing proper ornaments for the church and "keeping the church in repair, it would seem reasonably clear, "I should have thought, that the gifts came well within the "strict legal definition of 'charity,' because they are gifts for a "religious purpose, aimed at the religious edification and "instruction of the parishioners, and the provision of the "material means in the shape of church ornaments and so forth, "for attaining the end of performing divine service, as "ordained by the law of the church, in order to perfect the "edification and instruction of the parishioners." He found himself able to adopt that construction of the will before him, and, as I read it, took it for granted that, if that was the right construction, the gift would be perfectly good.

Lord Russell of Killowen, when the case went to the House of Lords, said in his speech (1): "Clauson L.J. found himself able "to construe this gift as a gift to the vicar and churchwardens, "the purposes for which the money was to be applied being "restricted by the words in brackets to the furtherance of work "which it was the duty of the vicar and churchwardens to "perform; that is to say, that the application of the money was "restricted to what I may call the religious purposes of the "parish in the strict sense." He found himself unable to put so narrow a construction on the words used by the testatrix;

(1) [1939] A. C. 430, 437.

but it seems, I think, clear that if he had been able to adopt the same construction as that adopted by Clauson L.J., he would not have dissented from the result of that construction as indicated in the passage which I have read from the judgment of Clauson L.J.

Now it is quite plain that, in addition to the strictly ecclesiastical functions which a vicar is called on to perform, there are various kinds of activities beneficial to the parish and parishioners which a vicar normally undertakes, and which, being of a purely benevolent character and being perhaps outside the ambit of his strict duties, are not charitable, because they are merely benevolent ; and, indeed, it is because of that fact that *Farley* v. *Westminster Bank* (1) was decided in the way it was decided. That fact, for example, was recognized by Lord Atkin in his speech. He said that he was unable to accept the construction which had been urged on them by Mr. Vaisey, on behalf of the appellants, that the words " for parish work " simply meant to express what would be implicit within the words " the vicar and churchwardens " without the addition of the words " for parish work." He says (2) : " My Lords, I am " entirely unable to accept that construction. I think the " words are quite plainly enlarging words. They are words of " definition, it is quite true, but I think they were used for the " very purpose of defining what the testatrix meant as the " purpose for which the money was to be applied, and ' parish " ' work ' seems to me to be of such vague import as to go far " beyond the ordinary meaning of charity, in this case in the " sense of being a religious purpose. The expression covers the " whole of the ordinary activities of the parish, some of which " no doubt fall within the definition of religious purposes, " and all of which no doubt are religious from the point of view " of the person who is responsible for the spiritual care of the " parish in the sense that they are conducive, perhaps, to the " moral and spiritual good of his congregation. But that, " I think, quite plainly is not enough ; and the words are so " wide that I am afraid that on no construction can they be " brought within the limited meaning of ' charitable ' as used " in the law. I find myself in entire accord with what was " said by the Master of the Rolls in the Court of Appeal, in a " passage which I will read. ' To my mind,' he said, ' the " ' whole question in this case turns on whether or not the " ' words ' for parish work ' can in some way be limited, either

(1) [1939] A. C. 430, 437. (2) Ibid. 435.

" ' by their own inherent meaning or by reference to the " ' character and quality of the trustees. I have come to the " ' conclusion, and I do so with regret, that that limitation " ' cannot be imposed upon the words. It seems to me that the " ' words ' for parish work ' are of a very wide character and " ' embrace not merely those limited functions in the parish " ' which it is the duty of the vicar to perform, or those limited " ' functions in the parish which it is the duty of the churchwardens to perform; nor can I limit those words by " ' narrowing them down to religious purposes in the strictly " ' charitable sense. It appears to me that, taking them as " ' words of ordinary English, they cover any activity in the " ' parish, any work in the parish which trustees of that " ' character may be expected to perform, whether that work " ' be strictly a religious purpose or strictly a charitable " ' purpose, or whether it be a work considered to be conducive " ' to the good of religion, or considered to be benevolent or " ' generally useful to the inhabitants of the parish or the " ' congregation of the church. It seems to me that the " ' words ' for parish work ' cannot be cut down or limited, " ' either by construing them in isolation, or by reference to the " ' character of the trustees '."

It is suggested in the present case that the gift of the testatrix in the will fails for the same reason as the gift failed in the case which I have just cited. It is said that the vicar does many things which are for the benefit of parishioners outside the scope of his strict duties as vicar, and that accordingly the words " for his work in the parish " enlarge to the point of destruction the ambit of the first part of the gift and that the whole gift accordingly fails.

It seems to me that this really comes down to a short point of construction of the language of the gift itself. If the phrase " to be used for his work in the parish " has no effect on the earlier part of the gift, or if, on construction, it has a narrowing effect, the gift is good. On the other hand, if the words " to be used for his work in the parish " have an enlarging effect, so as to bring within their contemplation the work of a benevolent or quasi-benevolent character, such as that referred to by Lord Atkin and the Master of the Rolls in *In re Ashton* (1), then the gift must fail.

In my view, the gift is sufficiently definite to be valid, and is also charitable. " I give the residue of my estate to the

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(1) [1938] Ch. 482.

"Vicar of St. Luke's Church, Ramsgate." Pausing there, the gift is good, on the authority of *In re Garrard* (1) and the cases that went before it. "I give the residue of my estate "to the vicar of St. Luke's Church, Ramsgate, to be used for "his work." Pausing there again, it seems to me that, up to that point, the gift is still perfectly good. It might be regarded as an indication by the testatrix ex abundanti cautela that the property was not to vest in the vicar for his own personal use, but was to be used in furtherance of the work which fell on him in the ordinary course as vicar of a parish and, as such, responsible for the care of his parishioners' souls.

Then as to the words "in the parish." If I am right so far, do those words invalidate, because of the theory of extension, what down to that point appears to be quite good? Again, in my view they do not. I am a little doubtful myself whether the whole of this phrase adds anything to what goes before, but, if it does, it seems to me that the words "in the parish" limit, to some slight extent, the earlier phrase, "to be used for his "work." There are kinds of work, I suppose, which a vicar sometimes does which strictly might be regarded as work done outside the parish, certainly if he is a rural dean and, possibly, if he is interesting himself, for example, in missions. But, be that as it may, what the extent of the narrowing may be I do not determine, because it is enough for my purpose if I am satisfied, and I am satisfied, that they do not have an extending effect.

It seems to me that the proper way to construe this gift is as a gift of the residue of the estate to the vicar of St. Luke's Church, Ramsgate, to be used for his work in the sense of work proper, that is to say, in the fulfilment of his functions as vicar, the work which was defined by Clauson L.J. in his judgment in *In re Ashton* (2), and the words "in the parish," if indeed they have any material effect at all, have a somewhat narrowing effect. It seems to me that there is a very considerable difference between a case like this and the case of *In re Ashton* (2). A gift to a vicar and churchwardens for parish work is a general phrase covering a multitude of activities, and, as such, was held to be too wide; but a gift to a vicar for his work in the parish, seems to me to be totally different and involving a totally different conception, and merely means that it is to be used for the purposes of such part of his work (that is to say, his functions connected with the cure of souls in the

(1) [1907] 1 Ch. 382.

(2) [1938] 1 Ch. 482.

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particular district) as lies within the particular parish. In my judgment, such work is both sufficiently definite and is charitable.

Solicitors: *Taylor, Jelf & Co.; Loxley & Preston; Bramston, Skelton & Dowse; Markby, Stewart & Wadesons; Treasury Solicitor.*

J. L. D.

ROXBURGH J.
1946
May 30, 31; *June* 6.

In re ARNO. HEALEY *v.* ARNO.

Will—Annuity—To be paid "without deduction of income tax up to "a maximum of five shillings in the pound"—Reliefs and allowances.

A testator by his will gave certain annuities and directed that they should be "paid without deduction of income tax up to "a maximum of five shillings in the pound":—

Held, that the form of the direction postulated freedom from income tax up to 5*s.* in the pound as a constant factor for the purpose of ascertaining the amount of the annual payment; that the decision in *In re Pettit* [1922] 2 Ch. 765, was inapplicable; and that the annuitants were entitled to retain the benefit of any income tax reliefs or allowances to which they might be entitled.

In re Bates Ante p. 83, distinguished.

ADJOURNED SUMMONS.

By his will, dated March 31, 1937, Thomas Arno, who died on May 30, 1937, gave four annuities, namely:—one of 1,600*l.*, and three of 500*l.* each, to be increased to 1,200*l.* each as from the expiration of three years from his death, and he directed that all these annuities "shall be paid without deduction of "income tax up to a maximum of five shillings in the pound." A summons was taken out by the executors and trustees of the will to determine whether the amount of each annuity payable by the trustees should be ascertained by calculating, first, the sum which, after deduction therefrom of income tax at the rate of 5*s.* in the pound thereon, would leave the net amount of the annuity bequeathed, and secondly, by deducting, from the gross amount so arrived at income tax at the standard rate in force for the year in which the annuity became due, or, whether some other and, if so, what, method of ascertaining the amount payable should be applied by the trustees in the payment of the annuities; and whether the annuitants were entitled to retain any reliefs or allowances by way of repayment of income tax to which they might be entitled.

W. G. H. Cook (with him *Duthie*) for the plaintiffs.

Gray K.C. and *Wilfrid M. Hunt* for annuitants. This case is distinguishable from *In re Bates* (1), and the sole duty of the trustees is to make a calculation resulting in the payment to each annuitant of the whole of the annuity and the setting aside of an additional sum, which will be sufficient to pay income tax on the whole of the annuity up to 5*s*. in the pound. The annuitants are entitled to retain any reliefs and allowances. He also referred to *In re Pettit* (2).

T. A. C. Burgess for another annuitant.

King K.C. and *Jopling* for the residuary devisees and legatees. The case is covered by *In re Bates* (1). The effect of this will is to give the annuitants an indemnity against income tax to the extent of 5*s*. in the pound—no more and no less. The annuitants, are, therefore, having regard to *In re Pettit* (2), accountable to the trustees in respect of any reliefs and allowances obtained by them. Otherwise the annuitant (for example) to whom the 1,600*l*. annuity is given, will, if she keeps all her allowances receive more than 5*s*. in the pound by way of tax exemption, which is not in accordance with the testator's direction.

Gray K.C. replied.

Cur. adv. vult.

June 6. ROXBURGH J. read the following judgment: It has been conceded, and, accordingly, I have already declared in answer to the first question raised by the summons, that on the true construction of the will and of the Income Tax Act, 1918, so long as the standard rate of income tax does not fall below 5*s*. in the pound, the amount of the annuity payable by the trustees of the will to each annuitant should be ascertained by calculating first the sum which after deduction therefrom of income tax at the rate of 5*s*. in the pound will leave the net amount of the annuity bequeathed, and secondly, by deducting from the gross amount so arrived at income tax at the standard rate in force for the year in which the annuity became due. The first of these calculations is required to give effect to the directions of the testator and the second to give effect to the

(1) Ante p. 83.

(2) [1922] 2 Ch. 765.

income tax legislation, and together they involve the following consequences: (1.) the gross sum will be a constant figure, (2.) the amount actually paid to the annuitant by the trustees will always be less than the stated amount of the annuity so long as the standard rate of income tax exceeds 5*s.* in the pound, (3.) the amount ultimately available in the hands of the annuitant will always fall short of the stated amount so long as his "effective rate" of income tax exceeds 5*s.* in the pound. By his "effective rate" I mean this. When the income tax liability of an annuitant has been finally ascertained in respect of any financial year, after taking into account all appropriate reliefs and allowances, it is possible to predicate, by comparing the total amount of income tax suffered (by payment or deduction) with the total gross income from all sources, that the effective rate of tax borne by him has been at the rate of x shillings in the pound. This rate of course (surtax apart) will be less than the standard rate, and it may be convenient to call it his "effective rate."

Now the case of an annuity which is altogether free of income tax is relatively simple. A gift of an annuity of a stated amount wholly free of income tax takes effect as a gift of a gross sum of such an amount as after deduction of income tax at a certain rate will leave the stated amount of the annuity bequeathed. But at what rate? In the first instance the deduction must be at the standard rate, and this will result in a payment to the annuitant of the stated amount, neither more nor less. Accordingly if the annuitant's effective rate of income tax is below the standard rate, the repayments, or allowances in account, to which he is entitled will enable him to receive in respect of the annuity a sum in excess of the stated amount. This anomaly is in my judgment the basis of the rule in *In re Pettit* (1) where Romer J. said: "I cannot understand "on what ground it can be suggested that such excess should "be retained by the annuitant who has not paid it" (i.e., the tax) "and not be handed back to the residuary legatees who "have." Accordingly the courts have, in the case of a wholly tax free annuity, generally been able to hold that the excess should be repaid by the annuitant to the estate. The result of the adjustment is that the annuitant gets in the end exactly the stated sum, and the intention of the testator is carried out, because the freedom from tax which the testator intends is "freedom from the tax which would otherwise be payable by

(1) [1922] 2 Ch. 765, 770.

" the particular annuitant " ; see the speech of Lord Russell of Killowen in *Inland Revenue Commissioners* v. *Cook* (1). But, of course (see again, the speech of Lord Russell of Killowen) the testator may show by particular words, as in *In re Jones* (2), that he intends " freedom from tax at the standard rate as a " fixed deduction for the purpose of ascertaining the amount " of the net annual payment," and then no adjustment falls to be made.

Different considerations arise in the case of annuities which are partly free of income tax. In the first place, the testator, when he states the amount of the annuity, cannot know what the annuitant will actually receive, because that will depend on the annuitant's effective rate of income tax. Therefore, in stating the amount, the testator is more likely to have an eye on what is to be paid by the trustees than on the sum to remain in the hands of the annuitant. This would not be so in the case of an annuity altogether free of tax. Secondly, the annuitant will never receive the stated amount of the annuity in full unless and until his effective rate of income tax falls to the figure at which the upper limit for freedom from income tax is fixed. Accordingly, the anomaly against which the decision in *In re Pettit* (3) is directed need not happen, and indeed is unlikely to happen. Thirdly, the gross sum involved in the calculation has to be ascertained in a different manner. In the present case, it is necessary to resort to the testator's direction to pay " without deduction of income tax up to a maximum of " 5*s*. in the pound " in order to calculate that gross sum. It is not possible in the case of any annuity partly free of income tax to calculate the gross sum solely by reference to the standard rate and the stated amount.

These differences between annuities altogether free of income tax and annuities partly free of income tax justify, in my judgment, a different approach to the problem of construction. So far only one case dealing with an annuity of the latter class seems to have been reported. In *In re Bates* (4) Romer J. had to consider a gift of annuities " clear of all death duties and " income tax up to but not exceeding 5*s*. 6*d*. in the pound but " not surtax," and he arrived at the conclusion that the principle of *In re Pettit* (3) applied. He held that it was reasonably clear that the testator intended to do no more than extend a partial indemnity to the annuitants, at the expense of his estate, against the income tax which was found ultimately to be payable in respect of their annuities.

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(1) [1946] A. C. 1, 21.
(2) [1933] Ch. 842.
(3) [1922] 2 Ch. 765, 770.
(4) Ante p. 83.

The language which I have to consider is substantially different. In the first place, there is no reference to surtax in the will before me. The importance of such a reference in this connexion is discussed by Lord Greene M.R., in *In re Maclennan* (1). Secondly, I am not concerned with a gift of annuities clear of tax, but with a direction for payment without deduction of tax. In other words, the eye of the testator is on the trustees making the payment, and not on the annuitant receiving the annuity. He is, in my view, directing his trustees to make such a payment as will relieve the annuitant from income tax on income from this source up to 5*s.* in the pound and leave him to bear whatever further tax may be payable. This result is achieved by making the calculations and payments which I indicated at the outset. Once this has been done the trustees are not, I think, intended to have any further concern with the annuitant's income tax liabilities. This seems to me to be the natural meaning of the testator's direction and also the meaning which the circumstances demand. He seems to be looking forward to rises in income tax, and to a state of affairs in which the annuitant could not possibly get more than 20*s.* in the pound of the stated amount. He does not seem to be thinking of the incidence of tax on the annuitant, or of the actual sum which will remain in the annuitant's hands, but seems anxious to place a definite upper limit on the extent to which rising income tax can impose further liabilities on his estate. I cannot see any indication contrary to this. It is significant, I think, that the testator has not limited the liability of his estate by reference to a proportion of the income tax which the annuitant has to bear in respect of income from this source, but by reference to a fixed rate, so that as the tax rises, the annuitant bears an increasingly large proportion. Finally, if in present circumstances the trustees are entitled to recover any part of the reliefs or allowances to which an annuitant is entitled, the estate will not in the result have relieved him of income tax to the full extent of 5*s.* in the pound, and such a result would appear to me to conflict with the language which the testator has used. Accordingly, I hold that the form of the direction contained in this particular will postulates freedom from income tax up to 5*s.* in the pound as a constant factor for the purpose of ascertaining the amount of the annual payment, and makes the decision in *In re Pettit* (1) inapplicable.

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(1) [1939] Ch. 750, 756.

In view of the conclusion which I have reached on the construction of the will, I need not express any opinion on Mr. Gray's powerful alternative argument. He submits that the principle underlying the case of *In re Pettit* (1) does not call for any repayment to an estate when and so long as an annuitant receives in the result less than the stated amount of his annuity. In the case of a tax free annuity (apart from statute) this can never happen. But if an annuity is tax free up to 5*s.* in the pound, this will always happen unless and until the annuitant's effective rate of income tax falls to 5*s.* in the pound. Until this effective rate falls so far (an unlikely contingency) the annuitant does not get 20*s.* in the pound of the stated amount, and accordingly Mr. Gray submits that the reasoning which I have quoted from the judgment of Romer J. in *In re Pettit* (1) is inapplicable. Moreover (until the effective rate falls so far) if the trustees do recover anything from the annuitant, Mr. Gray submits that he will not have been relieved from income tax to the full extent of 5*s.* in the pound and, accordingly, the testator's direction will have been frustrated. As these alternative contentions are not material unless I have misconstrued the will, I shall say no more about them, except that they merit attention.

I shall declare that each of the annuitants is entitled to retain the benefit of any income tax reliefs or allowances to which he or she may be entitled.

Solicitors: *Eagleton & Sons; Field, Roscoe & Co., for Hillman, Burt & Warren, Eastbourne.*

J. L. D.

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(1) [1922] 2 Ch. 765.

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Apr. 16;
May 15.

Distinguished. Re Rose. [1949] 1 Ch. 78

In re FRY, DECEASED.

CHASE NATIONAL EXECUTORS AND TRUSTEES CORPORATION *v.* FRY.

Emergency Legislation—Gift—Shares in English company—Transfer by donor domiciled abroad—Consent of Treasury applied for by donor and his agents—Death of donor before consent obtained—Validity—Defence (Finance) Regulations, 1939—*St. R. & O. No.* 1254 *of* 1940, *reg.* 3A.

A. T. who was domiciled in Florida and resident for the time being in New Jersey, was the owner of shares in an English company. While in New Jersey he executed transfers, expressed to be by way of gift, to his son and to a private company registered in England and sent the transfers to England to be registered. By reason of the restrictions imposed on the transfer of securities under the Defence (Finance) Regulations, 1939, the company were prohibited from registering, and therefore refused to register the transfers unless and until the consent of the Treasury to the transfers had been obtained. The forms necessary to obtain that consent were sent to the donor to sign and he returned them to England, duly signed, but died before the consent was obtained:—

Held, that the intended gift was incomplete and therefore inoperative, that the donor's executors ought not to execute confirmatory transfers and the shares belonged to the donor's residuary estate.

ADJOURNED SUMMONS.

One Ambrose Fry, was domiciled in the State of Florida, but at the date of his death, October 22, 1941, was resident in the State of New Jersey, U.S.A. He held 3,058 ordinary and 280 preference shares in Liverpool Borax, Ld., the certificates for which he had deposited with the Putney Branch of Barclays Bank. Towards the end of 1940 he executed in New Jersey transfers of these shares, as to 2,000 ordinary shares in favour of his son, the defendant Sydney Fry, and as to the remainder in favour of the defendants Cavendish Investment Trust, a private company, the whole of the shares in which were held by him and the members of his family, and sent these transfers, the first to the manager of the Putney Branch of Barclays Bank, and the second to R. Duncan French & Co. of Liverpool, the accountants and auditors of the Cavendish Investment Trust Co. In each case the transfer was by way of gift of the shares transferred to the transferees. After some delay, the transfers executed by the respective transferees, together with the share certificates, were sent to

Liverpool Borax Ld. for registration; but in view of the provisions of the restrictions on the transfer of securities then in force the company were unable and therefore refused without the consent of the Treasury to the transfers, to register them. To obtain this consent various forms and declarations had to be signed both by the transferor and the transferees and in addition a questionnaire was submitted to the transferor which he had to answer personally, and although the various forms, declarations and other documents were in the end completed, the transferor died before the requisite consent of the Treasury to either of the transfers had been obtained. The executors of the transferor accordingly took out this summons, asking whether they ought to execute confirmatory transfers of the shares to Sydney Fry and the Cavendish Investment Trust respectively or whether the shares belonged to the testator's residuary estate.

J. W. Brunyate for the plaintiffs. No gift can be claimed until the title of the transferee has been completed by registration. There is no valid gift either to Sydney Fry or to the Cavendish Investment Trust, Ld., because the testator could not transfer the shares without the consent of the Treasury and that had not been obtained at the date of his death. Regulation 3A of the Defence (Finance) Regulations (1) prohibits a transfer of shares, where either the transferor or the transferee is resident outside the sterling area without the Treasury consent. There is no complete legal title, and there is no equity in the court to perfect an incomplete gift. *Milroy* v. *Lord* (1); *Roots* v. *Williamson* (2).

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(1) By Defence (Finance) Regulations, 1939, Statutory Rules and Orders No. 1254 of 1940, reg. 3A, sub-cl. (1): "Subject to any "exemptions which may be "granted by order of the Treasury "no person shall, either on his "own behalf or on behalf of any "other person, agree to transfer "or acquire, or transfer or acquire "otherwise than by operation of "law or by inheritance, any "securities or any interest in "securities, unless the Treasury "or persons authorized by or on "behalf of the Treasury are satis"fied that no person resident out"side the sterling area has, im"mediately before the transfer, "acquisition or agreement, any "interest in the securities: "Provided that nothing in this "paragraph shall prohibit any "agreement, transfer or acquisi"tion which is effected with per"mission granted by the Treasury "or by a person authorized by "them or on their behalf."

Sub-clause (4): "Subject to "any exemptions which may be "granted by order of the Treasury "no person shall, except with "permission granted by the "Treasury or by a person author"ized by them or on their behalf, "enter any transfer of securities "in any register or book in which "those securities are registered or "inscribed unless there has been "produced to him such evidence "that the transfer does not involve "a contravention of this Regula"tion as may be prescribed by "instructions issued by or on "behalf of the Treasury."

H. H. King for the defendant Sydney Fry. The gift was a perfect gift and the executors of the testator should execute confirmatory transfers. The testator had done all that he possibly could to divest himself of the ownership of these shares and to transfer them to the defendant. *Milroy* v. *Lord* (1) was not a case of a completed gift. The shares passed under the deed of transfer which is in the proper form, but could not be registered because the consent of the Treasury had not been given. The testator had been informed that this was necessary and had signed all the necessary forms to apply for it. Registration is only required as between the transferor and the company in which the shares are held; as between transferor and beneficiary the transaction was complete. See *Gorringe* v. *Irwell India Rubber & Gutta Percha Co., Ld.* (3). The legal right to be registered as owner has been transferred to the defendant Fry.

A. H. Droop for the Cavendish Investment Trust, Ld. My interest is the same as Mr. King's and I adopt his argument. And see *Donaldson* v. *Donaldson* (4). There was nothing to prevent Mr. Fry from filling up the necessary forms asking for the consent of the Treasury, and it would certainly have been obtained, as the case is not within the mischief aimed at by the regulations. The law governing the transaction, as regards the validity of the gift is that of the testator's domicile, Florida, and that is not affected by the necessity of obtaining any consent of the British Treasury. In any case the testator did all that was in his power to satisfy the Treasury and the only reason for consent not being given was his death. If the law of Florida does not apply, that of New Jersey, where the transfers were executed, applies: *Republica de Guatemala* v. *Nunez* (5) per Lawrence L.J.

E. M. Winterbotham for the testator's widow, referred to Dicey on Conflict of Laws (4th ed.), at p. 806. American law in a question like this must be presumed to be the same as British law, unless there is evidence to show that it is different.

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(1) (1862) 4 De G. F. & J. 264, 274.
(2) (1888) 38 Ch. D. 485.
(3) (1886) 34 Ch. D. 128.
(4) (1854) Kay 711.
(5) [1927] 1 K. B. 669, 696.

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FRY, *In re.* CHASE NATIONAL EXECUTORS AND TRUSTEES CORPORATION *v.* FRY.

Droop. There is evidence showing that it is different. There is nothing in the regulation to prevent these defendants from acquiring equitable interests; it only prevented the transfer of the legal estate; *Cooper* v. *Cooper* (1). The personal representatives are bound to do all they can to complete the gift. That however would not apply to a cheque drawn by a testator who died before it could be presented.

M. O. C. Stranders for the defendant Mrs. Muriel Gee, adopted the arguments presented on behalf of the other defendants and referred to *Holt* v. *Heatherfield Trust* (2).

Brunyate replied.

Cur. adv. vult.

May 15. ROMER J. The question which I have to determine is whether the defendants Sydney Fry and the Cavendish Trust are entitled to call upon the plaintiffs to co-operate with them in obtaining legal and beneficial possession of the shares which the testator was minded to transfer to them. It was conceded on their behalf that they are to be regarded as volunteers, for no consideration passed or was ever intended to pass from them to the testator: the case is accordingly one where a person, having formed the intention to make a gift, dies before that intention has been fully and completely implemented. The law generally applicable to such a position was stated by Turner L.J. in *Milroy* v. *Lord* (3) as follows: " I take the law of this Court to be well " settled, that, in order to render a voluntary settlement valid " and effectual, the settlor must have done everything which, " according to the nature of the property comprised in the " settlement, was necessary to be done in order to transfer " the property and render the settlement binding upon him. " He may, of course, do this by actually transferring the " property to the persons for whom he intends to provide, and " the provision will then be effectual and it will be equally " effectual if he transfers the property to a trustee for the " purposes of the settlement, or declares that he himself holds " it in trust for those purposes; and, if the property be " personal, the trust may, as I apprehend, be declared either " in writing or by parol; but, in order to render the settle" ment binding, one or other of these modes must, as I under" stand the law of this Court, be resorted to, for there is no

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(1) (1888) 13 App. Cas. 88.

(2) [1942] 2 K. B. 1.

(3) 4 De G. F. & J. 264, 274.

"equity in this Court to perfect an imperfect gift. The cases "I think go further to this extent, that if the settlement is "intended to be effectuated by one of the modes to which "I have referred, the Court will not give effect to it by "applying another of those modes. If it is intended to take "effect by transfer, the Court will not hold the intended "transfer to operate as a declaration of trust, for then every "imperfect instrument would be made effectual by being "converted into a perfect trust." As the testator intended the gifts now in question "to take effect by transfer," it follows from these observations of Turner L.J. that no question as to the creation of a trust in favour of the donees can arise, and indeed, no argument so based was advanced on their behalf.

Mr. Sydney Fry and the Cavendish Trust clearly had not acquired, at the date of the testator's death, the legal title to the shares which they now claim, because the transfers had not been registered by Liverpool Borax Ld. Had they, however, arrived at the position which entitled them, as against that company, to be put on the register of members? Had everything been done which was necessary to put the transferees into the position of the transferor? If these questions (which are suggested by *Roots* v. *Williamson* (1)) could be answered affirmatively, the transferees would have had more than an inchoate title; they would have had it in their own hands to require registration of the transfers. Having regard, however, to the Defence (Finance) Regulations it is impossible, in my judgment, to answer the questions other than in the negative. The requisite consent of the Treasury to the transactions had not been obtained, and, in the absence of it, the company was prohibited from registering the transfers. In my opinion, accordingly, it is not possible to hold that, at the date of the testator's death, the transferees had either acquired a legal title to the shares in question, or the right, as against all other persons (including Liverpool Borax Ld.) to be clothed with such legal title.

As no question of a trust arises, I must next consider whether there had been a complete gift of an equitable interest in the shares. As to this, the argument for the transferees was put on more than one ground. It was said that the testator executed documents which were appropriate to the subject matter of the gifts, namely, share transfers; that these documents, being under seal, were irrevocable; that he did everything he could, and that was necessary for him to do, to divest himself of his legal and equitable interest in the shares in favour of the transferees; and that, even if he failed to succeed in his purpose so far as the legal title was concerned, he must be regarded as having passed to them his equitable interest in the shares. In *In re Williams* (1), Warrington L.J. (adopting the language of Turner L.J. in *Milroy* v. *Lord* (2) said: "Claiming as she does as a volunteer and alleging "that the assignor made this gift to her, she can only succeed "if she can show that the assignor did everything which, "according to the nature of the property comprised in the "assignment was necessary to be done in order to transfer "the property and render the assignment binding upon him." This, say the transferees, they have succeeded in showing in the present case. In illustration of the principle, they refer to such cases as *Ellison* v. *Ellison* (3) and *Donaldson* v. *Donaldson* (4) as establishing that in an assignment of an equitable interest in property the validity and effect of the assignment as between assignor and assignee is not affected by the absence of notice to the trustees in whom the property is vested. In further illustration, I was referred to the recent case of *Holt* v. *Heatherfield Trust Limited* (5) in which it was recognized that where there is an absolute assignment of a debt, the absence of notice to the debtor does not affect the efficacy of the transaction as between the assignor and assignee. "Until notice be given," said Atkinson J. in the last mentioned case, "the assignment is an equitable assignment, but it is "an assignment which requires nothing more from the "assignor to become a legal assignment . . . . it seems "beyond argument that the absence of notice does not affect "the efficacy of the transaction as between assignor and "assignee." So here, it is contended, the absence of registration of the share transfers does not affect the efficacy of the transaction as between assignor and assignee, and the transactions must be treated as complete assignments of the testator's equitable interest in the shares. Now I should have thought it was difficult to say that the testator had done everything that was required to be done by him at the time of his death, for it was necessary for him to obtain permission

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(1) 38 Ch. D. 485.

(1) [1917] 1 Ch. 1, 8.
(2) 4 De. G. F. & J. 264.
(3) (1802) 6 Ves. 656.
(4) Kay 711.
(5) [1942] 2 K. B. 1, 4.

from the Treasury for the assignment and he had not obtained it. Moreover, the Treasury might in any case have required further information of the kind referred to in the questionnaire which was submitted to him, or answers supplemental to those which he had given in reply to it; and, if so approached, he might have refused to concern himself with the matter further, in which case I do not know how anyone could have compelled him to do so. Apart, however, from considerations of this kind, it appears to me that reg. 3A of the Defence (Finance) Regulations prevents me from giving effect to the argument, however formulated, that at the time of the testator's death a complete equitable assignment had been effected. The interest in the shares so acquired by the assignees would indubitably be an "interest in securities" within the meaning of reg. 3A; and, inasmuch as they are prohibited from acquiring such an interest except with permission granted by the Treasury, this court cannot recognize a claim to such an interest where the consent of the Treasury was never given to its acquisition. The assignment and acceptance of the interest would both be equally incapable of recognition in the absence of Treasury sanction, and that sanction was never in fact obtained; it might indeed (although the probabilities are certainly otherwise) never have been forthcoming at all.

An argument was then urged by Mr. Droop, on behalf of one of the claimants, designed to avoiding the consequences of reg. 3A. This argument was, as I understood it, as follows:—The testator was at all material times domiciled in the State of Florida. Neither the law of that State nor the law of New Jersey (where he executed the share transfers) prohibited the assignment by the testator of his full equitable interest in the shares in question. Such an assignment might be prevented from receiving any effect in this country by reason of the Defence (Finance) Regulations, but those regulations had no operation either on the conscience or on the proceedings of any person domiciled in Florida or taking action in New Jersey. It was accordingly open for any person so domiciled or taking action to assign his equitable interest in the shares subject to a condition, namely, the condition that the assignee should obtain permission from the Treasury to acquire that interest. This, says Mr. Droop, is how the acts of the testator should be regarded, namely, as assignments, effective and valid by the law of the domicile and of the lex loci actus, of his equitable interest but conditional upon the assignees obtaining the requisite permission to enjoy the fruits of the assignments; and, if such permission were refused, then the assignments must be regarded as nugatory ab initio and for all purposes. As an essential part of the argument it is said that no effective equitable interest became vested in the assignees at all until the Treasury permission was obtained.

Mr. Brunyate (who assisted the court by arguing the case against the claimants) was prepared to agree, for the purposes of the argument, that the law of the States of Florida and New Jersey was as suggested by Mr. Droop. Even so, however, it is not, I think, possible for this argument, notwithstanding its ingenuity, to succeed. Assuming that had the testator been so minded he could by appropriate means have created the somewhat nebulous interests and highly artificial position involved in the argument of Mr. Droop, and conferred on his son and the Cavendish Trust equitable interests in the shares which had no effective existence in this country until Treasury sanction was obtained, I am bound nevertheless to look to what he did in fact and to the legal results which followed therefrom. And what he did in fact cannot, in my judgment, be regarded as having the effect which Mr. Droop invites me to attribute to his actions. What the testator did was to sign two documents of the kind appropriate to the intention to pass, and to pass immediately, his entire legal and beneficial interest in the shares in question. In other words, he executed two share transfers in the ordinary form. He or his agents also performed certain other acts, referred to in the evidence, with a view to obtaining registration of the transfers. It seems to me that I must regard these share transfers and other acts as either passing an interest in the shares to the transferees or not. If they did not, then there was not a complete gift of any interest in the shares at the testator's death. If, on the other hand, they did pass an interest, then such interest had no element of contingency or futurity about it, but was a present and effectual equitable interest and the acquisition thereof by the assignees was in violation of reg. 3A; and a claim to it cannot, as I have already said, be entertained by this court. The argument, accordingly, in my judgment, cannot on any view sustain the claims which it is sought to base upon it and it is not open to me to accept it. In the result I have arrived at the conclusion (with regret, as I frankly confess) that there is no principle which enables me to hold that Mr. Sydney Fry and the Cavendish Trust are entitled to the

ROMER J.

1946

FRY, *In re.* CHASE NATIONAL EXECUTORS AND TRUSTEES CORPORATION *v.* FRY.

shares which the testator undoubtedly desired them to have. I have no alternative, therefore, but to answer question 1 of the summons in the negative.

Solicitors: *Linklaters & Paines; Ellis, Bickersteth, Aglionby & Hazel; Hancock & Scott.*

H. L. L.

C. A.

1946

May 9, 13.

Lord Greene M.R., Morton and Somervell L.JJ.

SHAYLER *v.* WOOLF.

Contract—Assignability—Arbitration Clause.

The defendant sold to the plaintiff's predecessor in title a piece of land for the erection of a bungalow, and covenanted to supply water to the bungalow by means of an existing pump on adjoining land of the defendant, and to maintain the pump in repair. This covenant was expressed to bind the defendant's successors in title, but no mention was made of the purchaser's assigns. The contract provided for the submission of any disputes to arbitration. The pump having fallen into disrepair, the defendant sank a new shaft on her land, but did not connect the new supply to the bungalow. The original purchaser having sold the bungalow to the plaintiff with the benefit of the defendant's covenant to supply water, the plaintiff demanded a water supply, which the defendant refused to give.

Held (affirming Roxburgh J.) that the benefit of the covenant was assignable, and that the existence of the arbitration clause did not render it unassignable.

Observation of Wright J. in *Cottage Club Estates, Ld.* v. *Woodside Estates Co. (Amersham), Ld.* [1928] 2 K. B. 463, 466, explained.

APPEAL from Roxburgh J.

The defendant, Mrs. Woolf, in 1938 sold to Mrs. Iris Ethel Peacock a piece of land adjoining the defendant's premises. The contract provided that Mrs. Peacock should demolish an existing building, and erect a bungalow on the land, and that the defendant should for ten years supply water thereto by means of a pump already existing on her land, and should keep the pump in proper repair. The covenant by the defendant was expressed to be made " with intent to bind so far as may " be herself and her successors in title," but there was no mention of Mrs. Peacock's assigns. There was a clause providing that any dispute between the parties should be submitted to a single arbitrator. Mrs. Peacock duly erected the bungalow, known as "Pear Tree Cottage," and the defendant supplied water thereto in accordance with the contract. During the war the underground workings of the pump fell into disrepair and the defendant was advised that it was cheaper to sink a new borehole than to make the necessary excavations for the repair of the old machinery. The new supply was not connected to the bungalow, which was then unoccupied. Mrs. Peacock having sold the bungalow to the plaintiff under a conveyance assigning, so far as assignable, the benefit of the contract with the defendant for a supply of water, the plaintiff demanded to be supplied with water in accordance with the original contract. The defendant refused, and the plaintiff brought an action claiming specific performance or damages. Roxburgh J. gave judgment for the plaintiff and ordered an inquiry as to damages. The defendant appealed.

Hewins for the defendant. This covenant does not run with the land, and, in general, the benefit is not assignable if the assignment can increase the burden on the covenantor; nor if it can make any difference to the covenantor to which of two persons he has to discharge his obligation.

This contract contained an arbitration clause. Such a clause does not bind assigns unless they are specifically mentioned, or the contract is expressed to be assignable. See *Sturges* v. *Curzon (Lord)* (1); *Cottage Club Estates, Ld.* v. *Woodside Estates Co. (Amersham), Ld.* (2); *Aspell* v. *Seymour* (3).

Fawell for the plaintiff, was not called on.

LORD GREENE M.R. In spite of a gallant attempt by Mr. Hewins to get his case upon its legs, in my opinion this is a perfectly plain case, and Roxburgh J. was manifestly right.

[His Lordship stated the facts, and held that there had, on the facts, been a breach of covenant. That issue does not call for a report. His Lordship continued :]

The next point that was argued was as to the assignability of this covenant. It was pointed out, quite properly, that the agreement is not in terms expressed to extend to bind assigns and it was also pointed out that there is a reference to the successors in title of Mrs. Woolf, and an express intention to

(1) (1851) 7 Exch. 17.
(2) [1928] 2 K. B. 463, 466.
(3) [1929] W. N. 152.

bind them in regard to her repairing covenants. Those points are, of course, legitimate points to put forward; but the question that we have to decide is, first of all, on the true construction of this contract, when interpreted in relation to the surrounding circumstances and its own subject matter, was it the intention of the parties that the contract should be assignable? In my opinion, there can be only one answer to that question. There is nothing in the nature of personal services concerned in this agreement. Subject to one point which was argued on the arbitration clause which I shall mention later, there can be no possible suggestion that in the case of an assignee of Pear Tree Cottage the burden on Mrs. Woolf would have been any greater than it would have been in the case of Mrs. Peacock herself. None of those objections to assignability therefore arise. When one looks at the subject-matter of the agreement —a purchaser of land from Mrs. Woolf, erecting a bungalow on it, which has no water supply, and desiring to have a water supply—if the water supply is personal to the purchaser herself, what is to happen when she dies? What is to happen if she wants to sell? Obviously, the value of the newly-erected bungalow would be very much lower unless she could pass to the purchaser the benefit of this agreement, because the bungalow would not have a water supply. Looking at the whole nature of the subject matter, it seems to me impossible that any sensible persons could have intended in the circumstances that the right to this supply should be personal to Mrs. Peacock herself. I come to that conclusion quite clearly, notwithstanding the fact that there is an express reference, for the purpose of the repairing covenant, to the assigns of Mrs. Woolf.

That only leaves one point and that is the arbitration clause. It is said that the contract cannot be assignable, because of the existence of the arbitration clause, inasmuch as such a clause is in its nature not assignable, or, it is said, is only assignable where the assigns are expressly mentioned in the clause itself or the contract which contains the arbitration clause is itself expressly declared to be assignable.

In my opinion, those propositions are incapable of support in the wide way in which they are stated; nor does any of the authorities quoted to us in support of them really touch the point. The question whether an arbitration clause prevents a contract from being assignable must depend on the intention of the parties, and the nature of the contract will, of course, be very important. Quite apart from an arbitration clause, if the nature of the contract is one which makes it incapable of assignment, owing to its personal nature, there is no question, of course, of the assignability of the arbitration clause; but that an arbitration clause is assignable in its nature seems to me to be quite clearly contemplated by s. 4 of the Arbitration Act, 1889, and it has been recognized in this court in one of the authorities referred to, namely, *Aspell* v. *Seymour* (1).

As I have said, apart from this arbitration clause, the agreement in this case is, in my opinion, quite clearly assignable, and it seems to me that the result of that must necessarily be that the arbitration clause also follows the assignment of the subject matter of the contract. There is nothing, I conceive, in principle or authority which would prevent that from taking place. The consequence is that, in my opinion, this was a contract assignable by Mrs. Peacock and, as it was assigned by her in her conveyance to the present plaintiff, the benefit of the contract is now vested in him and he is entitled to sue on it.

The learned judge, in my opinion, was perfectly right and this appeal must be dismissed with costs.

MORTON L.J. I entirely agree with the judgment which has been delivered and I only wish to add a few words upon one submission made by Mr. Hewins. He submitted boldly, as a general proposition, that the benefit of an arbitration clause could never be assigned; and this view appears to be put forward in Russell on Arbitration and Award, 13th ed., p. 46, where the learned authors say: "A submission is defined as a "written agreement to submit present or future differences to "arbitration. It is a personal covenant and cannot be assigned." They then go on to deal with a more limited matter.

That general statement appears to be based upon an observation of Wright J. in the case of *Cottage Club Estates, Ld.* v. *Woodside Estates Co. (Amersham), Ld.* (2). He said in that case: "The arbitration clause is a personal covenant and "cannot be transferred; nor, indeed, was it transferred in "any sense in this case." In my view, in that sentence Wright J. was dealing with the facts in the case before him, and did not intend to lay down any such general proposition as is contended for by Mr. Hewins and set out in the 13th ed.

(1) [1929] W. N. 152.

(2) [1928] 2 K. B. 463, 466.

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of Russell. As my Lord has said, any such general proposition would appear to be contrary to the provisions of s. 4 of the Arbitration Act and, in my view, it cannot be sustained. I agree that the appeal should be dismissed.

SOMERVELL L.J. I agree with the reasons which have been given by the Master of the Rolls for dismissing this appeal and I should also like to state expressly my agreement with what has just fallen from my brother Morton with regard to the nature of an arbitration clause. It seems to me that on any ordinary principle it certainly is not a personal covenant in the sense in which the adjective " personal " is ordinarily used in this context.

Appeal dismissed.

Solicitors for defendant: *Kingsford, Dorman & Co., for Girling, Wilson & Bailey, Herne Bay.*

Solicitors for plaintiff: *Bentley, Taylor & Co.*

J. W. H.

WYNN-PARRY J.
1946
Mar. 19;
July 18.

In re POINTER.

SHONFIELD *v.* EDWARDS.

Family provision—Order—Will dated before September 3, 1939—*Testator's death after that date—Whether provision affected by Finance Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1—*Inheritance* (*Family Provision*) *Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 3, *sub-s.* 1.

By an order made under the Inheritance (Family Provision) Act, 1938, it was directed that the trustees of the will, dated March 30, 1938, of a testatrix, who died on December 7, 1939, should, subject as provided in the order, pay, out of the income arising from one-fifth part of the residuary estate, the clear weekly sum of 30*s*., after deduction of income tax and free of legacy duty, to the daughter of the testatrix. The trustees made the payment until May, 1945, and, as they then refused to continue to make payments in full, having regard to the provisions of s. 25 of the Finance Act, 1941, the daughter took out a summons to determine whether she was entitled to payment in full or only to twenty-twenty-ninths of the amount :—

Held, that, as the effect of the order was to place the daughter in the position of a beneficiary and the provision was not made until the moment of the testatrix's death, which took place after September 3, 1939, the provision was not affected by s. 25 of the Finance Act, 1925.

Berkeley v. *Berkeley* [1946] W. N. 138; followed.

ORIGINATING SUMMONS.

The facts and the question raised by the summons are sufficiently stated in the head note.

J. V. Nesbitt for the plaintiff. Section 25, sub-s. 1, of the Finance Act, 1941 (1), does not apply. The daughter is enabled to ask for administration by reason of the order, which has the effect of making her a beneficiary. [He referred to s. 3, sub-s. 1, of the Inheritance (Family Provision) Act, 1938 (2).] Although the will was made before September 3, 1939, the provision was not made before that date. It was made by the order of December 7, 1940. Until the order was made the provision did not apply.

Humphrey H. King for the trustees.

Christie K.C. and *Elverston* for the residuary legatee. This is a provision "contained in the will." The order is contained in the will and has the effect of rectification. The gift is a gift by the will payable, by virtue of the will. As the will was made before September 3, 1939, s. 25, sub-s. 1, of the Finance Act, 1941, applies. He referred to *In re Waring* (3).

Nesbitt replied.

Cur. adv. vult.

July 18. WYNN-PARRY J., reading a judgment, said: It was submitted on behalf of the annuitant that the provision which had been made for her must be regarded for the purposes

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(1) Finance Act, 1941, s. 25, sub-s. 1: "Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax other than surtax being a provision which —(*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court . . .; and (*b*) was made before September 3, 1939: and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is ten shillings in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof."

(2) Inheritance (Family Provision) Act, 1938, s. 3, sub-s. 1: "Where an order is made under this Act, then for all purposes, including the purposes of the enactments relating to death duties, the will shall have effect, and shall be deemed to have had effect as from the testator's death, as if it had been executed with such variations as may be specified in the order for the purpose of giving effect to the provision for maintenance thereby made."

(3) [1942] Ch. 426.

WYNN-PARRY J.

1946

POINTER, *In re.* SHONFIELD *v.* EDWARDS.

of s. 25 of the Finance Act, 1941, as having been made by the order and not by the will. I do not accept this contention. It is clear from the provisions of the Inheritance (Family Provision) Act, 1938, that a dependant in whose favour an order is made under the Act is placed for all purposes in the position of a beneficiary. Secondly, it is clear that the effect of any such order is to vary the will in question: see s. 1, sub-s. 3 and s. 3.

Section 3, sub-s. 1, is in wide terms and provides as follows:— [His Lordship read the sub-section and continued:] The reference to the enactments relating to death duties shows that the section proceeds on the footing that the provision made by the order is to be treated as a legacy. In my judgment the scheme of the Act involves first, that, assuming the necessary conditions obtain, the court may by order make provision for the dependant applying to it; secondly, if it makes such an order the provision made thereby is to be treated for all purposes as a legacy; and thirdly, the will is for all purposes to have effect as if that legacy had been contained in it when it was made.

This does not, however, conclude the matter. In the recent case of *Berkeley* v. *Berkeley* (1) the House of Lords, overruling the decision of the Court of Appeal in *In re Waring* (2), has held that a "provision" contained in a will or codicil within the meaning of s. 25 of the Finance Act, 1941, is not "made" until the moment of the testator's death. As I have stated, the testatrix died on December 7, 1939. It follows therefore that the provision made for this applicant under the Inheritance (Family Provision) Act, 1938 is unaffected by s. 25 of the Finance Act, 1941, and there will be a declaration accordingly.

Solicitors: *R. A. W. Moylan-Jones; Soames, Edwards & Jones.*

(1) [1946] W. N. 138. (2) [1942] Ch. 426.

J. L. D.

In re CRAWSHAY DECEASED.

HORE-RUTHVEN *v.* PUBLIC TRUSTEE.

VAISEY J.

1946

July 5, 9.

Will—Legacy settled on daughter and her children—Gift over on death without leaving children to attain twenty-one—Codicil—Exclusion of any children of daughter by a proposed marriage from share in legacy—Marriage of daughter—Death of daughter, leaving children who attained twenty-one—Whether gift over effective.

A testasor who died in 1879 settled by his will a legacy of 100,000*l.* on one of his daughters for life with remainder to her children and a gift over to her nephews and nieces at her death in case there should be no child of hers who should live to attain the age of twenty-one years. The residue was given upon trusts for other persons. By a codicil the testator reciting that his daughter was engaged to be married to one W., and that he disapproved of such marriage, excluded any child or children of the proposed marriage from any benefit or interest in the settled legacy. The daughter became the wife of W. and had two children by him who attained twenty-one, but could not take any benefit under the legacy:—

Held that, reading the will and codicil together, the gift over to the daughter's nephews and nieces took effect, although the exact event on which it was to operate did not happen, and the legacy did not fall into residue. The gift over must be read as intended to take effect in case there should be no child to attain a vested interest.

ADJOURNED SUMMONS.

The facts, as stated by the learned judge, were as follows. Under the will of Robert Thompson Crawshay, dated June 24, 1877, and the first codicil to such will, dated November 14, 1877 (the testator dying on May 10, 1879), a question arose as to the devolution after her death of a sum of 100,000*l.* invested in consols held by the trustees of the will in trust in the first place for the testator's daughter Rose Harriette Crawshay for life. Under the will, the consols were to be purchased or appropriated in the names of the trustees and during the life of the daughter they were to pay to her the income arising from the fund. After her death, the will directed that the whole of the fund should be held on trust for all and every or any one or more exclusively of the others or other of her issue (born or to be born in her lifetime or within twenty-one years after her death) if more than one in such shares and with such future or executory or other trusts for the benefit of the said issue or some or one of them with such provisions for their respective maintenance, education and advancement at the discretion of the trustees or of any other person or persons and upon such conditions with such restrictions and in such manner as Rose Harriette Crawshay should by any deed or deeds with or without power of revocation and new appointment or by will or codicil appoint and in default of such appointment and so far as no such appointment should extend in trust for all and every her children or child (living at the testator's death or born afterwards) who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry under that age with the consent of her parents or parent or guardian or guardians for the time being and if more than one such child in equal shares.

After a hotchpot clause, the testator declared that, in case there should be no child of the daughter Rose who being a son should live to attain the age of twenty-one years or being a daughter should live to attain that age or be married (there being no reference there to any consent) his trustees should on the death of the daughter or default of her issue (whichever should last happen), hold the sum of 100,000*l.* or so much thereof as should not have become vested in any child of hers under the power of appointment and as should not have been applied under the power of advancement upon such trusts for the benefit of all or any of the children who might be living at the time of her decease of her brothers and sister and in such proportions and subject to such conditions and provisions as Rose Harriette Crawshay should by will appoint but, in the event of her not exercising such power, then the testator directed that the fund should be divided equally between all such children of her brothers and sister as should be living at her decease.

By a codicil executed shortly after the will, the testator after reciting that his daughter Rose was engaged to be married to a Mr. Williams, and that he (the testator) disapproved of such marriage, proceeded to declare that none of the children or issue of his said daughter Rose by the said Mr. Williams should in any way take any share or interest whatsoever in the beforementioned trust fund or any part thereof under any of the trusts powers and provisions of the will but that his said will should read in all respects as if all and every the child children and issue of the said intended marriage of his said daughter Rose with the said Mr. Williams had been expressly excluded by his said will from all benefits interest or right of participation whatsoever in the said trust fund or any part thereof but so that nothing therein contained should in anywise affect the interest in the said trust fund or any part thereof of any child or children of his daughter Rose by any other husband than the Mr. Williams and in all other respects he thereby confirmed his said will.

The daughter Rose was married once only, namely, to Mr. Williams, and by such marriage she had issue two children who attained twenty-one. Consequently, the event upon which, according to the strict language of the will, the gift over to her nephews and nieces was to take effect did not happen. It was, however, suggested that the provisions of the codicil amounted to this: that the children of the daughter Rose by Mr. Williams were not to count as her children for any purpose whatsoever, or that in the conditional words which prefaced the gift over, the word "child" signified a child entitled to benefit under the trust which immediately preceded the hotchpot clause.

Droop for the plaintiff.

Leslie Mumford for the Public Trustee and three other defendants.

Geoffrey Cross for Mrs. Spiller, a niece of the daughter.

G. A. Rink for the defendant J. W. L. Crawshay.

C. D. Myles for the defendant Mrs. Greener.

J. N. Gray K.C. and *Ungoed Thomas* for other defendants interested in the testator's residuary estate.

The arguments appear sufficiently from the judgment. The following authorities were cited: *Brookman* v. *Smith* (1), *In re Edwards* (2), *Agnew* v. *Pope* (3), *Morley* v. *Rennoldson* (4), *Hillersdon* v. *Lowe* (5), *Ellicombe* v. *Gompertz* (6), *In re Merceron's Trusts* (7), *Pride* v. *Fooks* (8), Jarman on Wills, 7th ed., vol. II., p. 164.

VAISEY J. The question is one of difficulty. There is, on the one hand, the principle laid down in *Hillersdon* v. *Lowe* (5), namely, that the court will, if necessary, construe an inaccurate statement of the event upon which a preceding trust will

(1) (1872) L. R. 7 Ex. 271.
(2) [1906] 1 Ch. 570, 574.
(3) (1857) 1 De G. & J. 49.
(4) [1895] 1 Ch. 449.
(5) (1843) 2 Ha. 355.
(6) (1837) 3 My. & Cr. 127.
(7) (1876) 4 Ch. D. 182.
(8) (1858) 3 De G. & J. 252.

fail and a gift over take effect as equivalent to no more than such an expression as " failing the preceding trust " ; see the leading case of *Ellicombe* v. *Gompertz* (1). The principle has been applied in other cases, such as *In re Merceron's Trusts* (2). Now I find that even in the will itself the statement of the event on which the gift over was to take effect is inaccurate since it omits any reference to consent in the case of a daughter's marriage, and, therefore, in order to make sense of the will, it must be read as equivalent to a declaration that in case the fund should not become vested under the preceding trust it is to go over to the nephews and nieces. There is already a discrepancy in the will itself which has to be resolved by reference to the preceding trusts ; the codicil has introduced another discrepancy, and I do not see why it should not be similarly resolved. If a daughter marrying without consent and dying under twenty one had been the only child of the daughter Rose, the gift over would, in my judgment, have taken effect, thereby doing violence to the literal expressions preceding it ; and the same result seems to me to follow in the event which has happened of the daughter Rose having had no child except the children disqualified from taking by the codicil.

I think this case is near the line. Many authorities have been cited to me in support of the other contention, which is that this fund falls into residue because the express event on which the gift is to take effect has not actually happened. In particular I have been referred to *Pride* v. *Fooks* (3), *Brookman* v. *Smith* (4) and *Morley* v. *Rennoldson* (5) and finally to *In re Edwards* (6). In the last case " a testatrix " gave all her real and personal estate to trustees in trust for " her children who attained twenty-one or marriage, and if " more than one in equal shares, with a gift over to other " persons in the event of her death ' without leaving any " ' children surviving me.' There was one child, who survived " the testatrix and died an infant : Held, reversing the decision " of Buckley J., that the child did not take a vested interest " at birth ; and, secondly, that the gift over did not take " effect, and that there was an intestacy."

Of course, there is a very strong principle indeed that when you find a will stated in plain and unmistakable language you must not construe a codicil so as to interfere with the dispositions of the will more than the words of the codicil require. It is said in Hawkins on Wills, 3rd ed., page 9, in the inverted commas which show that the passage is part of the learned author's original work: "It is a general principle to construe "a codicil so as to interfere as little as may be with the dis"positions of the will: and the onus probandi is on those "claiming under the codicil to show that it displaces the will." The principle is so clear that it requires no further exposition from me, but, after all, the two documents have to be read together, and, having read them together, I am convinced that, just as the proviso and declaration which prefaces the gift over is a proviso and declaration which, according to the proper terms and meaning of the will alone, does and can mean no more than "failing the operation of the preceding "trust," so also it should and must continue to have that meaning when the further discrepancy is introduced by the words of the codicil. I do feel the force of the principle that the will has spoken and must not be silenced by the codicil more than is necessary. However, I think that this case is more on the lines of the cases which I first cited than on those of the cases to which I last referred. I think it is very unlikely that the testator really intended that if his daughter Rose married Mr. Williams and never had a child by him the fund should go to the nephews and nieces, while if she married him and had a child who attained twenty-one (that child taking, of course, no interest under the will) the fund should go to her three brothers who are the residuary legatees under the will. It is much more likely, and not merely from the probabilities of the case but from the actual wording of the document itself, that if the testator had intended to interfere with the gift to the nephews and nieces he would have said so in the codicil and would not have left the matter sub silentio. I cannot see what reason the testator could have had other than mere caprice for saying that if his daughter married Mr. Williams and had children by that marriage and by no other marriage the ultimate trusts for the nephews and niece were to be overridden and cancelled.

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(1) 3 My. & Cr. 127.

(2) 4 Ch. D. 182.

(3) 3 De G. & J. 252.

(4) L. R. 7 Ex. 271.

(5) [1895] 1 Ch. 449.

(6) [1906] 1 Ch. 570.

I think the proper order to make on the question in paragraph 1 of the originating summons is that upon the true construction of the testator's will and first codicil and in the events which have happened of the daughter Rose having had by her husband Mr. Williams two children who attained the age

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of twenty-one years and not having had any child by any other marriage the legacy of 100,000*l.* became on her death held on the trusts declared by the testator's will of the said legacy in case there should be no child of the said daughter Rose who being a son should live to attain the age of twenty-one years or being a daughter should live to attain that age or be married.

Solicitors: *Lawrence, Graham & Co.; Gilbert Samuel & Co.; Wellington, Taylor & Co.; Farrer & Co.*

H. L. L.

ROXBURGH J.

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June 15, 26.

In re SAGE. LLOYD'S BANK LIMITED *v.* HOLLAND.

Settlement—Condition—Life interest in personal estate—To commence from date when beneficiary should have transferred shares into name of settlor—Death of settlor without execution of transfer—Whether beneficiary entitled to transfer shares to settlor's executors—Acceptance of shares by executors.

In 1926 a settlement was made under which the trustees were to pay the income of certain stocks to the settlor's daughter during her life as from the time that she should have executed and delivered transfers of shares mentioned in the schedule into the name of the settlor, and until such transfer the income was to be paid to another beneficiary. The settlor died in 1942 up to which time no such transfer had been executed.

Held, that the condition was capable of being performed by the daughter after her father's death, and that if she executed the transfers she would become a beneficiary under the settlement the object of the condition being to secure that she should not enjoy the income of the settled stocks, without giving up the shares. The executors were entitled to accept the transfers, which would benefit the settlor's estate.

In re Goodwin [1924] 2 Ch. 26 followed.

ADJOURNED SUMMONS.

By a settlement, dated October 26, 1926, and made between Harold Savill Sage as settlor of the one part and Lloyd's Bank Ld., as trustees of the other part, the settlor directed the trustees to stand possessed of certain stocks which had been transferred to them upon trust to pay the income thereof to Thelma Kathleen Sage from and after the date of the delivery and execution by her of transfers into the name of the settlor of the shares mentioned in the schedule thereto, which were then vested in the joint names of Thelma Kathleen Sage and the settlor. The income was payable to her without power of anticipation and subject to forfeiture in the event of attempted alienation. After the death of Thelma Kathleen Sage and during her life until she should execute and deliver the said transfers the trustees were directed to hold the trust funds on other trusts, but there was no resulting trust in favour of the settlor himself. The settlor died on November 25, 1942, and up to that time Miss Sage had executed no transfer of the shares in question, which were all marketable securities. Miss Sage (who in 1927 changed her surname to Holland) now desired to execute transfers of those shares into the names of the settlor's executors, or as they should direct, if the transfer would have the effect of giving her a beneficial interest in the trust funds. This summons was taken out by the trustees asking (*a*) whether a transfer by the defendant Thelma Kathleen Holland executed after the death of the settlor into the names of his personal representatives or as they should direct would be a transfer into the name of the settlor within the meaning of the settlement; (*b*) whether the personal representatives of the settlor were bound or (alternatively) entitled to accept any such transfer as aforesaid into their own names; (*c*) whether the defendant Thelma Kathleen Holland had any beneficial interest in the settled fund; (*d*) whether the defendant Nigel Sage who claimed under an interest in remainder had any interest in the settled fund.

G. D. Johnston for the plaintiffs.

Milner Holland for the defendant Thelma K. Holland. The object of the settlor in imposing this condition was not to get the shares mentioned in the settlement transferred to him personally but to prevent Miss Holland from enjoying both the income produced by the shares and that produced by the settled fund. She had to give up the former to obtain the latter. The authorities show that the court will put a reasonable construction on conditions of this kind. It can now be complied with by transferring the shares to the testator's estate. There is no distinction between cases of similar conditions under settlements and under wills. See *In re Goodwin* (1) where it was held that a similar condition, not being personal, could be complied with after the death of the person on whom it was imposed by her executors. The executors need be under no liability for calls, as they can sell any shares transferred to them.

(1) [1924] 2 Ch. 26.

Hillaby for the defendant Nigel Sage. The settlor intended Miss Holland to give up her interest in these shares and desired to know personally that she had done so. The condition is one that ought to have been strictly complied with, and it is now too late to do so. A condition requiring the beneficiary to transfer shares into the "name of the settlor" means exactly what it says, and does not mean "the settlor or his executors:" *In re Madge* (1). If the terms of a condition are perfectly clear literal compliance with them may be necessary. See Halsbury's Laws of England, 2nd ed., vol. 34, p. 118.

Ian Campbell for the settlor's executors. The question is whether we are bound now to accept the transfers. They can only be made to my clients as trustees and not as executors. "Settlor" means settlor only. The executors ought not to be subjected to any personal liability on these shares.

Holland replied.

ROXBURGH J. after stating the facts proceeded: I appear here to be approaching a point of some novelty. Counsel have not been able to find, nor have I myself found, any case where a question of this kind has arisen under a settlement. But cognate questions have not infrequently arisen under wills. In *In re Goodwin* (2), the headnote of the case is as follows: "A testator who died on November 1, 1906, "bequeathed an annuity of 500*l.* to his wife to commence "from the day of his death, and he declared that the annuity "was intended to be in lieu of and in substitution for the "annuity of 70*l.* which he had covenanted by deed to pay to "his wife, and that the bequest thereof should become and be "absolutely void and of no effect unless his wife should within "six calendar months after his death absolutely release and "discharge his estate, effects and trustees from payment of the "70*l.* annuity as from the date of his death. There was a gift "of residue in the will but no gift over of the annuity on failure "to comply with the condition. Owing to heavy incumbrances "it remained doubtful during the life of the widow whether "the estate would produce anything for the beneficiaries and "she died on February 10, 1921 without having done anything "specifically during her life to comply with the condition. "The trustees being now in a position to make payments to the "beneficiaries raised the question whether the annuity had not "been forfeited by non-compliance with the condition.

(1) [1928] W. N. 71.

(2) [1924] 2 Ch. 26.

"*Held*, that the condition was not personal to the annuitant "so as to be performed only by her, and that a present release "by her executors which would all put parties in the position "intended by the testator would be a sufficient compliance "with the condition. *In re Packard* [1920] 1 Ch. 596 adopted." In that case there was a wide margin between the time prescribed by the testator, and the time at which the condition was performed by the beneficiary. Romer J. (as he then was) first of all dealt with the question of time, and did so as follows: "It is well settled by authority that where a gift in a will is "made subject to a condition, even a condition precedent, "to be performed within a specified time, but the condition "is not in fact performed within that time, then, at any "rate in the absence of an express gift over, it is always a "question for the court to determine whether the time so "specified was of the essence of the matter. In determining that "question the court must have regard to what was presumably "the intention of the testator in inserting the condition, what "it was that he desired to bring about or to guard against; "and if the court finds that a performance of the condition at a "time subsequent to the expiration of the period fixed by the "testator in substance provides for the very thing that the "testator intended to provide for, so that all parties can be "put in substantially the same position as they would have been "in had the condition been performed within the proper time, "time is not regarded as of the essence, and such performance "is treated as a sufficient compliance with the condition." He then proceeded to consider whether the condition could be complied with by the executors of the wife, and held that a release by her executors complied with the condition.

In the absence, it appears, of any guidance from text-books or authorities, I propose to approach the words in this settlement by the same route, and to consider whether the act of transfer was intended to be something personal to the transferee, or whether a transfer to the settlor's executors will put the parties in the position which the settlor intended them to occupy. It seems to me that the act which has to be done is in no sense personal to the settlor. All those securities are marketable securities. Mr. Hillaby, in his forcible submissions, suggested that they might be liable to great fluctuations in value. But as the settlor gave Miss Holland the whole period of his own life in which to execute the transfers he could not have been concerned about such fluctuations. He was intending

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to make it certain that Miss Holland should not keep these shares and at the same time obtain the benefit of the settlement. He was not acting from any personal motive. It is, of course, altogether for the benefit of his estate that Miss Holland should now execute these transfers, and thereby increase it. It is only the other beneficiaries under the settlement who would suffer. I think that the answer to them must be that it does not matter whether the settlor happens to be alive or not so long as Miss Holland does not retain the shares. Therefore in my judgment, the effect of a transfer by Miss Holland to the executors of the settlor would place all parties beneficially interested in the position which the settlor intended them to occupy and would be a sufficient compliance.

During the argument the point was raised by the executors that they ought not to be compelled to accept transfers, because on some of the shares there was an uncalled liability. I agree that the executors ought not to be subject to any personal liability, but I cannot think that that circumstance ought to affect my decision in the matter. They have only to go into the market and sell the shares on which there is any liability and direct Miss Holland to transfer them to the purchaser.

Solicitors: *Beckinsales & Naylors; Stanley Evans & Co.; Le Brasseur & Oakley.*

H. L. L.

ROMER
J.

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July 16, 17.

ALEXANDER KORDA FILM PRODUCTIONS LIMITED *v.* COLUMBIA PICTURES CORPORATION LIMITED AND ANOTHER.

Practice—Writ of summons—Order for service of concurrent writ out of jurisdiction — Misnomer of defendants served — Conditional appearance entered—Application by defendants to set aside writ, service, and subsequent proceedings. Proper course to be adopted by defendants misnamed where mistake obvious—R. S. C. Or. 12, *r.* 30, *Or.* 70, *rr.* 1-3.

An action having been brought against an English and an American company, leave was obtained to issue a concurrent writ, and notice of the writ was served on an officer of the American company abroad, but an error was made in the name of the company. The company entered a conditional appearance, and then took out a summons to have the writ, the order for leave to issue the writ, service of it and all subsequent proceedings set aside.

Held, that the application failed. The mis-description being only a slight one, and there being no doubt who were the persons intended to be sued, the defendants' proper course was to enter an appearance, but to state in the memorandum of appearance that they were sued under an incorrect name. The misnomer did not invalidate the order for service.

ADJOURNED SUMMONS.

The summons was issued on the application of Columbia Pictures Corporation Ld., sued as Columbia Incorporated, and asked that an order, dated December 13, 1945, the writ of summons issued pursuant thereto—a concurrent writ—the service thereof, and all subsequent proceedings, be set aside on the grounds that the writ of summons was irregular in that the second named defendants were described therein as "Columbia "Pictures Incorporated," and that in the meantime all further proceedings therein be stayed. The original writ was issued on September 4, 1945, and addressed to Columbia Pictures Corporation Ld., of No. 18, Bloomsbury Square, London. By the writ the plaintiffs claimed an injunction to restrain the defendants from representing and performing in public a certain film, together with ancillary relief, as being an infringement of their copyright. The plaintiffs asked the defendants' solicitors to accept service of the writ on behalf of the first named defendants, which they did. The defendants' solicitors said there was no such company as the second named defendants carrying on business in this country. The plaintiffs then issued a summons for leave to issue a concurrent writ and to serve notice thereof on Columbia Pictures Incorporated, and on December 13, 1945, Master Holloway made an order giving leave to issue a concurrent writ and serve notice thereof on the defendants, Columbia Pictures Incorporated at No. 729, Seventh Avenue, New York City, U.S.A., the time for the defendants to enter an appearance to be within fifty-five days after service. Notice of that writ was served on a Mr. Abraham Schneider of 729, Seventh Avenue, New York, who described himself as Vice-President and Treasurer of Columbia Pictures Corporation of New York. He made an affidavit saying that notice of a concurrent writ in lieu of service to be given out of the jurisdiction was served on him on February 5 and that the name of the company of which he was Vice-President and Treasurer was Columbia Pictures Corporation. Upon that, Columbia Pictures Corporation (the American company), entered a conditional appearance on March 29, 1946, and their

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appearance was expressed to be conditional and "without "prejudice to an application to set aside the order dated "December 13, 1945, the writ of summons issued pursuant "thereto, the service thereof, and all subsequent proceedings."

Clark K.C. and *Gilbert Dare* for applicants. No leave to serve a proper writ has ever been given. We might have ignored the service, but instead we have entered a conditional appearance. The only proper course open is to take out a summons under Or. 12, r. 30, to set aside the order for service, the writ and all subsequent proceedings. And see Or. 2, r. 3. The English Court must guard the rights of foreigners who should only be sued under their proper names.

Pascoe Hayward K.C. and *Skone James* for the plaintiffs. This is but a trivial mistake, the application has no merits and should be dismissed, The whole matter could be put right immediately by amending the writ, for which leave would be granted. The case can properly be dealt with under Or. 70, r. 1: see *Zuccato* v. *Young* (1); *Smith* v. *Hammond* (2) and *Nelson* v. *Pastorino* (3). And see Daniell's Chancery Practice 8th ed. at p. 293. No confusion was caused, as the American defendants knew quite well that they were the persons intended to be sued. The application should have been by motion not summons.

Clark K.C. in reply referred to s. 62 of the Judicature Act, 1925. The application could have been made by summons or motion in the Chancery Division, but only by summons in the King's Bench Division.

Here the applicants might have been seriously misled by the misnomer. See Or. 70, r. 3. There is no authority on the point, as none of the cases referred to were cases of service out of the jurisdiction. The defendants ought not to have to pay the costs of the plaintiffs' mistake.

ROMER J. [after stating the facts]. The applicants say that they took the only course that was reasonably open to them, in issuing the summons. They could not safely ignore the writ, notwithstanding that they are wrongly described and the name of the American Company did not appear upon it. They say that although there was a mis-description, it was reasonably obvious, and they acted on the footing, that it was intended

(1) (1890) 38 W. R. 474.

(2) [1896] 1 K. B. 571.

(3) (1883) 49 L. T. 564.

for them, and that being so they could not ignore it and allow the matter to proceed without any action on their part; and I was referred to certain statements and orders in the White Book as showing that that was a proper course to adopt, and that if they had entered an unconditional appearance, it would have been too late for them to have raised any objection hereafter.

In the Annual Practice at p. 105, there is a note to Or. 11, r. 1, which says: "An application to set aside the service or "order for service may be made after entering, or without "entering, a conditional appearance"; and under Or. 12, r. 30: "A defendant before appearing shall be at liberty, "without obtaining an order to enter or entering a conditional "appearance, to take out a summons in the King's Bench "Division and in any other division take out a summons or "serve notice of motion to set aside the service upon him of the "writ or of notice of the writ, or to discharge the order "authorizing such service." Then there is a note below: "This means before entering an unconditional appearance . . . "After unconditional appearance it is too late to object to any "irregularity in the service or issue of the writ of which the "defendant had knowledge, for appearance is a 'fresh step' "within Or. 70, r. 2." Then there is a note at p. 153 to that rule: "Applications under this rule are not in practice confined "to setting aside the service, but both in the Chancery Division "and the King's Bench Division include applications to set "aside the writ for irregularity, or for irregularity in the issue "thereof, or for the irregularity of an order for issue and service "thereof abroad, as well as for defective service of the writ "or notice." The applicants say that having regard to the practice as so set out, and to the circumstances of the case, in which a gentleman found himself presented with a writ on behalf of a company which was mis-described, that was the best thing he could do, enter a conditional appearance and then issue a summons to have the writ and the order which authorized the writ, set aside.

The plaintiffs, on the other hand, say, in the first place, that the American company could have safely ignored this writ, because they were not mentioned in it; or alternatively, and this, they say, is the course which the American company ought to have adopted, they ought to have entered an appearance in their correct name, stating in the memorandum of appearance that they had been sued by the wrong name. That

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mode of procedure is recommended at p. 293 of Daniell's Chancery Practice, where the following statement appears: "If a defendant has been sued by a wrong name, he should "appear by his right name, stating in the memorandum of "appearance that he was sued by the wrong name; and the "plaintiff should proceed to amend the writ, for the judgment "must accord with the writ." Now an obvious qualification which is implicit in that statement is that the defendant has reasonable grounds for supposing that he is the person the plaintiff intended to sue. There may be cases where the mis-description is of such a character as to make it reasonably plain that the person who is served with the writ is not the right person at all. In that case probably he would make up his mind not to enter an appearance, but in ordinary cases the practice which is suggested by Daniell commends itself to one as being a reasonable course to adopt; and in the Annual Practice for the present year at p. 135 there is a note which appears to be to much the same effect. It is a note to Or. 12, r. 1, which is the rule dealing wth appearance, and the note, which is headed "Misnomer," is as follows: "A defendant may "by his appearance correct any mistake in the names by which "he is sued, so long as it is clear that he is the defendant sued. "Where a defendant is sued in a trade or business name, "e.g., 'Madame James,' appearance should be entered as "follows: 'Enter an appearance for Madame James whose "'real name is Anne Smith, but who is known (or trades) "'as Madame James.' This correction does not relieve the "plaintiff from the necessity of amending his writ, if the alteration of name is material." So that is the alternative procedure which the plaintiffs say was open to the American company and which they ought to have adopted; and, for my part, I would add as a yet further possible alternative in cases such as the present, that the mis-described defendant if he knows with all reasonable certainty that he is the person intended to be sued, can write to the solicitors for the plaintiff and acquaint them of the position.

It is clear that an irregularity has occurred, because a writ of summons, in order to comply with the procedural requirements of this court, has to bear upon its face the correct names of the plaintiff and of the defendant. This concurrent writ, indeed, the original writ, errs in that respect, and the question, and really I think the only question, I have to decide is whether in view of the irregularity the American company has adopted a proper course in entering a conditional appearance and issuing this summons in the form and shape which it bears.

The plaintiffs say, in the first place, that it is a trumpery irregularity, and that it has not led to any misconception on the part of anybody. They say that it has never been the practice of the court to regard a mere misnomer as invalidating proceedings, and such authority as there is on that topic goes the other way. I was referred to *Zuccato* v. *Young* (1), where: "The writ in an action described the defendant as 'J. L. "'Young, carrying on business as the Edison Mineograph "'Company, at No. 60, Ludgate Hill.' The defendant who "was not in fact carrying on the business, entered an appear- "ance as 'J. L. Young sued as J. L. Young, carrying on business "'as the Edison Mineograph Co., at No. 60, Ludgate Hill, but "'who denies that he is carrying on business as the Edison "'Mineograph Co., at No. 60, Ludgate Hill aforesaid or "'elsewhere.' *Held*, on motion by the defendant to set aside "the writ and subsequent proceedings on the ground of "irregularity, that there was no irregularity in the writ, and "that the mistake had been set right by the form in which an "appearance had been entered by the defendant; and the "motion was refused." North J. said: "I do not think there "is any irregularity in the writ. The effect of the evidence is "that the defendant is not carrying on business as the Edison "Mineograph Co., but does not deny that he did what he is "alleged to have done. It is the same thing as if a defendant "named John had been sued as James, in which case the "mistake could be easily corrected in all subsequent pro- "ceedings, as the mistake has been corrected in the present "case. In this case matters have already been set right by the "form in which the appearance has been entered by the "defendant. If the amended title is used in the subsequent "proceedings, they will be perfectly regular, and the defendant "will be in no way prejudiced. I must refuse the motion, "the costs to be costs in the action." I read that statement of his with reference to John and James as being of perfectly general application, notwithstanding the fact that there was a difference between that case and the present on the ground that an appearance had been entered by the defendant, thus in effect waiving the irregularity.

That view of North J. was quoted without disapproval in

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(1) 38 W. R. 474.

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Smith v. *Hammond* (1). There the headnote is: "The "defendant applied to set aside a writ of summons, which "had been issued and served upon him in England, on the "ground that by the writ the defendant was incorrectly "described as of Lytham in the County of Lancaster, whereas "his only place of business and address was at Londonderry "in Ireland. *Held,* refusing the application, that the incorrect "statement of the defendant's address did not vitiate the writ, "and it was good." Baron Pollock, in delivering the judgment of the court, after reading the writ, said: "That no doubt is an "incorrect description, but it really is not very different from "an ordinary case of misnomer, as if, for instance, as North J. "said in *Zuccato* v. *Young* (2), 'a defendant named John had "'been sued as James'." He took, therefore, the same view apparently of cases which are cases of mere misnomer as North J. had taken in *Zuccato* v. *Young* (2). But the matter does not rest there, because in Or. 70, r. 1, there is an order of general application in these terms: "Non-compliance "with any of these rules, or with any rule of practice for the "time being in force, shall not render any proceedings void "unless the court or a judge shall so direct, but such pro"ceedings may be set aside either wholly or in part as irregular, "or amended, or otherwise dealt with in such manner and upon "such terms as the court or judge shall think fit."

It is clear, I think, on the authority of the cases to which I have referred, as also on the language of Or. 70, r. 1, that the writ which is being impeached on this application is not void and ought not to be set aside on the ground of invalidity. What, then, is the course which the American company ought to have adopted? Not, as I think, the summons which they have issued, the purpose of which—although it is true that yesterday an undertaking was given on the part of the American company to facilitate matters by entering an appearance if sued in the right name—would be to set aside the whole of the proceedings under which the writ was issued and the writ itself, and which would result in the plaintiffs having to start all over again, with the attendant cost and delay which would be entailed, unless no other course was reasonably open to the American company of a somewhat less drastic nature. I do not say that the American company should immediately have written, informally perhaps, to the plaintiffs when they became cognizant of the mistake under which the plaintiffs were labouring, although perhaps it would have saved a good deal of trouble and expense if they had. Nor do I suggest that the American company ought to have ignored the whole matter.

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(1) [1896] 1 Q. B. 571.

(2) 38 W. R. 474.

There are cases, as I have already said, where a person is so wildly mis-described that, coupled with other circumstances, it may be apparent that he is not the person intended to be sued at all, and then he might well take no notice of the matter and allow the plaintiff to proceed, if he chose to, in default. But here the mis-description was not of a very serious kind. The " Columbia Pictures " was right ; it was the " Corpor-" ation " that was wrong, and I do not think that anybody on behalf of the American company had any doubt—at all events, it has not been suggested they ever had any doubt—but that they were the persons whom the plaintiffs intended to sue. Indeed, in the summons itself they describe themselves as " Columbia " Pictures Corporation sued as Columbia Pictures Incor-" porated " and, having regard to all the circumstances, and the comparative triviality of the error, I am not suggesting that the American company behaved unreasonably in not ignoring the whole matter and in entering an appearance, although I think it is fairly plain that if they had not entered an appearance at all, the plaintiffs' judgment recovered in default would not have been valid against them.

But I do feel that the method of procedure suggested in Daniell's Chancery Practice at p. 293, and in the Annual Practice also is the right one, and should have been adopted by the defendants in this case, namely, entering an appearance in their own name and stating in the memorandum that they were sued by the wrong name. It seems to me that that would have amply protected them. It would have clarified the position with the minimum of expense and trouble to all concerned, and should have been adopted by the American company. The alternative which they did select, had it been successful, would have caused a great deal of trouble, expense and delay, and without, as far as I can see, achieving any real object or advantage which it was necessary or desirable that the American company should achieve. Surely it is as necessary now, as always, to reduce the costs of litigation in so far as they can be reduced, and reduce delay in litigation in so far as delay can be reduced ; and if there are two alternative methods open to a litigant, it is very much to be desired that he should adopt that alternative which obviates expense and delay rather than an alternative which obviates neither. So that, so far as the summons is founded on the irregularity of the writ itself, having regard to the misnomer of the American company, in my judgment the American company took a wrong course, and the course which it did take cannot be allowed or sanctioned.

It is to be observed that the summons also asks that the order of December 13, 1945, together with the writ itself, " the service " thereof, and all subsequent proceedings, be set aside with costs " to be taxed—. . . . on the grounds that the writ of summons is " irregular in that the second named defendants are described " therein as ' Columbia Pictures Incorporated ' and that in the " meantime all further proceedings herein be stayed." Applications of this kind to set aside proceedings for irregularity are governed by Or. 70, r. 3, which says : " Where an application is " made to set aside proceedings for irregularity, the several objec- " tions intended to be insisted upon shall be stated in the summons " or notice of motion " ; and there is a footnote : " Where " this rule was not complied with, no costs were allowed to the " applicants, though successful ; and applicant is confined to " the objections stated." I believe that to be a correct statement, and I propose to apply it to the present case.

The grounds stated are that the writ of summons is irregular in that the second named defendants are wrongly described. Whether the " writ of summons " there means the original writ or the writ issued in pursuance of the order of December 13, 1945, I am not altogether clear, but whichever it is, I cannot see that that irregularity in itself invalidates either the order or the service of the writ. The writ itself has been attacked, and I have dealt with that, but in so far as the summons deals with the order under which it was issued, and all proceedings following upon that order, I cannot see that the misnomer in the writ is a ground for upsetting the order. But on the footing that it is, or one can read sufficient into the summons to satisfy the requirements of r. 3, it was suggested by Mr. Pascoe Hayward that the whole of this summons was misconceived on the ground that it ought to have been by motion.

The position is this : The order was made by a master, and the ordinary course, which of course was not available here, if either side is dissatisfied with the order of a master, is to have it adjourned forthwith to the judge. But if it is not done in that way, the undoubted practice in the Chancery Division is to launch a motion before the court for the purpose of discharging it. That, I think, is conceded by Mr. Andrew Clark as the clear practice of this division, and as Master Holloway's order became in effect the judge's order when it was drawn up, Mr. Pascoe Hayward says that the defendants' only recourse was to move to discharge it in accordance with the practice which I have stated, and which was recognized by the Court of Appeal in *Perry* v. *St. Helen's Land & Construction Co., Ld.* (1). Mr. Pascoe Hayward says that there is nothing in the rules of the Supreme Court which disturbs the practice so far as this application is concerned, and he referred me to s. 62 of the Judicature Act of 1925, which is to this effect: " Subject to the " provisions of this Act, with respect to appeals in matters of " practice and procedure, every order made by a judge of the " High Court in chambers, except orders as to costs only " which by law are left to the discretion of the court, may be " set aside or discharged upon notice by any Divisional Court " or by the judge sitting in court, according to the practice " of the Division to which the cause or matter in which the order " was made is assigned." He says that that recognizes the practice, that you have to look and see what is the practice of any particular division, that this is a case in the Chancery Division, that the practice in the Chancery Division is what I have stated it to be, and the application should be made by motion. Mr. Andrew Clark agrees to that, but he points out that s. 62 is " Subject to the provisions of this Act," and he says that that introduces the rules made under it. He says that Or. 12, r. 30, is a provision which expressly deals with the particular subject matter now under consideration, and that therefore the ordinary practice obtaining in this Division is ousted so far as the subject matter of this application is concerned.

As to which of those two views is the right one, I do not express a concluded opinion. It seems to me at all events doubtful whether the established practice of the Chancery Division, which so far as I was aware until to-day had been the established practice in relation to all subject matters in this Division, would cover also the case before me; I think, on the whole, it would, and the matter could be brought before the judge by motion from the master's order which had become a judge's order; but, on the other hand, I think there is much weight to be attributed to Mr. Andrew Clark's view that the matter is regulated by Or. 12 r. 30. However, in as much as I have come to the conclusion that the grounds of objection

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stated in the summons itself do not go to the invalidation of the order at all, I do not have to decide that question, and I refrain from doing so. On the whole matter, I dismiss the summons with costs.

Solicitors for plaintiffs: *Slaughter & May.*
Solicitors for defendants: *Wright & Webb.*

H. L. L.

END OF VOL. AND OF CHANCERY SERIES FOR 1946.

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